govern the same issues in subsequent stages in the same case." *Graves v. Lioi*, 930 F.3d 307, 318 (4th Cir. 2019) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

During the telephone conference with the Court on June 30, 2020, the Court ruled that general objections to discovery requests and objections on the grounds of privilege were waived. Furthermore, the Court ruled that unless Defendants had authority for their specific objections, those were waived as well.

On July 6, 2020 during the follow-up meet and confer between Counsels for Defendants and undersigned Counsel for Plaintiff, Counsels for Defendants stated that Defendants do not support their specific objections to discovery requests with authority, thus waiving such objections. Furthermore, Counsels for Defendants stated that Defendants are dropping their claim for lost profits in the amount of $1.2 million due to the loss of contract with KDC/One allegedly caused by Plaintiff.

Argument

Defendants have not produced or supplemented their deficient discovery responses to satisfy the Plaintiff's objections as set forth herein; rather Defendants have thrown in duplicate documents, Plaintiff's own documents already produced, and irrelevant documents to make it appear they have complied. Of the roughly 769 pages of documents produced, fewer than 200 real responsive documents have been produced in a commercial transaction case that took place over a total of ten (10) months' time. The second supplement documents produced amounted to a mere twenty-one (21) pages of real, relevant, previously unproduced documents that were not duplicates, previously produced documents ,or irrelevant documents.

General and Specific Deficiencies

The following notes the deficiencies of Defendants' responses to Plaintiff's discovery requests:

Duplicates, Previously Produced, & Irrelevant Documents

Defendants have produced a total of 769 pages of documents, a vast number of these being duplicates. Please see attached Exhibit 7 for detailed description of the documents and which of Defendants' responses are duplicates of themselves.

Of the 579 pages produced by Defendants on May 4, 2020, 438 of these pages are duplicates of documents already produced by Plaintiff to the Defendants in response to Defendants' own Requests for Production of Documents (*see generally* Bates Nos. 20-434; 446-470). Additionally, 208 pages of the 579 are duplicates of documents within Defendants' own responses (Bates Nos. 6; 126-127; 145-248; 249-369; 395-419; 446-470; 491-492; 494-496; 504-519; 545-566).

Of the 189 pages produced by Defendants on July 6, 2020, sixteen (16) pages are duplicates of documents within Defendants' own responses (Bates Nos. 605-606; 670; 679-681; 733-740; 768-769). Additionally, fifty-seven (57) pages are duplicates of documents previously produced by Plaintiff to Defendants (Bates Nos. 613-621; 673-676; 687-706; 766-767). Finally, ninety-five (95) pages are documents that are irrelevant to this matter (Bates Nos. 625-662 and 707-765).

Interrogatory No. 7

This relates to the allegation of Plaintiffs that Defendants were unable to pay for the machine. See Request to Produce No. 9 as well below. No supplemental response was given and no documents produced.

Interrogatory No. 8

This relates to Plaintiffs being alleged to be the first breachers due to being unable to deliver in a timely fashion. See Request to Produce No. 11 below. No supplemental response was given and no documents produced.

Interrogatory No. 11

This also relates to Plaintiff breaching by missing deadlines. See Request to Produce No. 11 below. No supplemental response was given and no documents produced.

Interrogatory No. 13

This relate to KDC/One's contract and sale to Plaintiff. See Request to Produce No. 7 below. No supplemental response was given and no documents produced.

Request for Production of Documents No. 6

This request goes to the linchpin of Defendants' defense: that Mast/Bath and Body Works cancelled its contract with Defendants because Plaintiff could not deliver and therefore Plaintiff is the breacher, not Defendants. No supplemental documents were produced.

Request for Production of Documents No. 7.

This request goes to the crux of the allegation by Defendants that they were the reason the later sale of the equipment happened and it netted an additional $40,000.00 plus dollars. No documents have ever been produced. Furthermore, Defendants' attempt to qualify production by stating "to the extent they refer to its purchase of the equipment from WPI" flies in the face of Defendants' own counterclaim allegations in paragraphs 19-21 of the Counterclaim.

Request for Production of Documents No. 9.

This response is wholly evasive and takes the gold medal for spin doctoring by qualifying documents that show "breach." The parties may dispute whether Defendants were "unable to pay," but that allegation has been made and is subject to discovery in order to prove

it at trial. No responsive documents were ever produced showing that Defendants were able to pay during the timeframe made out in the Complaint by producing financials, lines of credit, loans, venture capital or group funding for example.

Request for Production of Documents No. 11.

This request relates directly to the scheduling of the delivery of the WPI Equipment and is central to the dispute about whether Plaintiff complied with the delivery schedules or not and whether Plaintiff breached any agreements. However, no supplemental documents were produced at all.

Lastly, even though it appears that Defendants objected on privilege grounds to Request for Production of Documents Nos. 6, 7, 9, and 11, such objections have been waived by the Court, and the relevant documents now must be produced. In review of the documents produced by Defendants up to July 7, 2020, there appear to be no such privileged documents included.

CONCLUSION

In light of the Motion to Compel, this Brief, and the attached exhibits, Plaintiff asks this Court to grant the Motion based on the foregoing, any Reply Brief, and any oral argument or evidence submitted at any hearing on this Motion.

Dated: July 7, 2020.

Respectfully Submitted,
WeightPack, Inc.

/s/ Barry C. Hodge_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on July 7, 2020, via the Court's CM/ECF electronic filing systems addressed to all parties on the e-service list.

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Attorneys for Defendant

/s/ Barry C. Hodge_____
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Applicant Details

First Name	**Jennifer**
Last Name	**Hopkins**
Citizenship Status	**U. S. Citizen**
Email Address	**jennifer.hopkins18@my.stjohns.edu**
Address	**Address** **Street** **18138 Aberdeen Road** **City** **Jamaica** **State/Territory** **New York** **Zip** **11432** **Country** **United States**
Contact Phone Number	**8455214370**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**December 2017**
JD/LLB From	**St. John's University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23311&yr=2010**
Date of JD/LLB	**June 21, 2021**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**St. Johnâ€™s University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**St. Johnâ€™s University Moot Court Honor Society**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Duryea, Catherine
duryeac@stjohns.edu
4107467606
Borgen, Christopher
borgenc@stjohns.edu
McGuinness, Margaret
mcguinnm@stjohns.edu
Sovern, Jeff
sovernj@stjohns.edu
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References

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Chris Borgen, borgenc@stjohns.edu, +1-718-990-1982
Peggy Mcguinness, mcguinnm@stjohns.edu, 001-718-990-8018

This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year law student at St. John's University School of Law. I am writing to you because I am interested in a clerkship position with your chambers commencing in the fall of 2021. I believe that my academic and professional background make me a well-qualified candidate for this position.

I just finished my virtual summer associate program at Wollmuth Maher and Deutsch, where I gained exposure to all different fields – litigation, corporate, bankruptcy etc. More specifically, I learned about residential mortgage backed securities, by assisting with document review, motion filing, and deposition preparation for multiple cases. Last summer, I interned in the chambers of Presiding Justice Scheinkman of the Appellate Division, Second Department. In addition to assisting with the drafting and revising of court decisions, I conducted legal research and wrote memoranda addressing various important issues, such as mortgage foreclosures and child support obligations. These experiences have confirmed my interest in litigation – which is why I am so excited about the opportunity to clerk in your chambers.

Before attending law school, I interned for 340B Health, a drug pricing program that helps uninsured Americans receive the healthcare they need. Through this internship, I collaborated with representatives from hospitals all over the country to prepare materials for meetings with Congress. Additionally, I participated in the White House Internship program, where I replied to correspondence that was sent to President Obama and the First Family. I also volunteered to answer phone calls on the White House comment line and crafted legal memoranda that outlined employee ethics regarding accepting gifts. All of my internship experiences have taught me that I enjoy being in a position where I can serve my community.

Currently, I am a senior articles editor of The St. John's Law Review and a member of the Moot Court Honor Society, where I am constantly learning valuable skills for the legal profession, such as being articulate and analytical. I am eager to clerk in your chambers and develop these skills further, while learning more about public service and our judicial system. I would appreciate the opportunity to meet with you to discuss my interest and qualifications. Thank you for your consideration.

Sincerely,
Jennifer Hopkins

JENNIFER HOPKINS

181-38 Aberdeen Road ♦ Jamaica, NY 11432
(845) 521-4370 ♦ jennifer.hopkins18@my.stjohns.edu

EDUCATION

St. John's University School of Law, Queens, NY
Juris Doctor Candidate, Expected June 2021
Academics: GPA: 3.57 | Rank: 39/206 (Top 20%)
Honors: *Senior Articles Editor*, St. John's Law Review; *Member*, Moot Court Honor Society; *Finalist,* Hon. Milton Mollen Moot Court Competition; Dean's List (Spring 2019, Fall 2019)
Activities: *Student Fellow*, Center for International and Comparative Law; *Writing Consultant*, St. John's School of Law Writing Center; *Team Captain*, Jessup Moot Court Team (2020–21); *Research Assistant*, Professor Peggy McGuinness; *Teaching Assistant*, Professor Jeff Sovern, Civil Procedure (Fall 2019, Fall 2020); *Teaching Assistant*, Professor Jeremy Sheff, Property (Fall 2020); *Teaching Assistant*, Professor Christopher Borgen, Introduction to Law (Fall 2020); *Volunteer*, Civil Legal Advice and Resource Office
Publications: "An Immigration Innovation: A Comparative Analysis of the American Diversity Visa Lottery Program and the Canadian Points-Based System," *St. John's Law Review* (Forthcoming Spring 2021).

University of Maryland, College Park, MD
Bachelor of Arts, Government and Politics, December 2017
Honors: Dean's List (January 2017 – December 2017)
Activities: *Pre-Law Member*, Phi Alpha Delta Law Fraternity; *Vice President*, Maryland Women's Club Crew
Study Abroad: UMD-in-London (January 2016 – May 2016)

PROFESSIONAL EXPERIENCE

St. John's Securities Arbitration Clinic, Queens, NY
Clinical Student, August 2020 – Present

Wollmuth Maher & Deutsch LLP, New York, NY
Summer Associate, June 2020 – August 2020
Examined, analyzed, and outlined trust-specific documents concerning residential mortgage backed securities (RMBS), relating to litigation stemming from 2008 financial crisis. Proofread and cite checked motions concerning RMBS and bankruptcy law. Attended virtual meetings and training sessions with other summer associates, associates, and partners.

Catholic Migration Services, Brooklyn, NY
Legal Intern, August 2019 – October 2019
Participated in client intake meetings. Assisted with filing of asylum applications. Performed factual investigation and legal research. Assisted attorneys in preparation for hearings before the Executive Office for Immigration Review.

Honorable Alan D. Scheinkman, Presiding Justice,
Appellate Division, Second Department, New York State Unified Court System, White Plains, NY
Judicial Intern, May 2019 – August 2019
Conducted legal research and drafted memoranda summarizing findings. Assisted in the drafting and revising of various decisions. Attended court proceedings and participated in conferences with Presiding Justice and judicial staff.

340B Health, Washington, D.C.
Government Relations Intern, January 2018 – May 2018
Prepared materials for meetings with Congress to support 340B Health's lobbying efforts. Corresponded with organization members to prepare an 'Impact Profile,' illustrating 340B's positive impact on the community.

WeGift, London, UK
Marketing Associate, May 2017 – August 2017
Developed and implemented marketing strategy to target international audiences. Planned attendance of international events, including eGift conferences in China, the UK, and the US.

United States House of Representatives, Washington, D.C.
Intern for Congressman Paul Tonko (NY-20), January 2017 – March 2017
Communicated with constituents by answering phones, responding to letters, and greeting office visitors.

White House Internship Program, Washington, D.C.
Office of Presidential Correspondence Intern, Gifts Unit, August 2016 – December 2016
Received, sorted, and replied to gifts sent to the President and First Family. Answered phone calls from the public leaving comments for the President on the White House comment line. Assisted in the preparation of staff gift guidance memoranda re ethics issues.

The Conservative Party, London, UK
Office Intern for Wandsworth and Wimbledon, January 2016 – May 2016
Assisted in mayoral campaign through canvassing, editing leaflets, and analyzing constituent surveys.

Jennifer Hopkins
St. John's University School of Law
Cumulative GPA: 3.57

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Sovern	A-	4	
Constitutional Law I	DeGirolami	A	2	
Contracts I	Borgen	A-	3	
Introduction to Law	Ward	P	2	
Legal Writing I	Smith	B	2	
Professional Development	Ardan	P	0	
Torts	Joseph	B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law II	Barrett	A	3	
Contracts II	Borgen	B+	2	
Criminal Law	Levine	B+	3	
Lawyering	Montana	B+	2	
Legal Writing II	Smith	A-	2	
Professional Development	Ardan	P	0	
Property	Dilorenzo	A-	4	

Dean's List

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Strongin	A-	3	
Directed Research - Law Review	Duryea	A-	2	
Evidence	Cunningham	B+	4	
International Law	McGuinness	A	3	
International and Foreign Legal Research	Islam	A	2	

Dean's List

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Duryea	CR	3	
Business Organizations	Wade	CR	4	
International Environmental Law	Borgen	CR	3	
Internet Law	Klonick	CR	2	
Professional Responsibility	Evans	CR	3	

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Health Law	Vila		2	
Law Review - E-Board			2	
Securities Arbitration Clinic	Lazaro		4	
Tax - Basic Federal Personal Income	Todres		3	
Trusts and Estates	Subtonik		4	

October 05, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am an Assistant Professor at St. John's School of Law, where I had the pleasure of teaching Jennifer (Jen) Hopkins in Administrative Law and advising her student note. I am writing to warmly recommend her as a law clerk.

I first met Jen in the summer of 2019 when she approached me about advising her law review note on U.S. immigration policy, specifically the diversity visa program. Jen took on an expansive project, diving into a vast literature spanning law and other fields. She combed through news articles, statistical reports, and a wide range of primary and secondary sources to argue why the U.S. should implement a point-based immigration system similar to Canada's. Her note was one of 13 selected for publication, out of 39 submitted. Jen was diligent, thorough, and dedicated to her research. She was also a pleasure to work with.

Jen was then a student in my Administrative Law course in Spring 2020. St. John's did not award letter grades in the spring semester due to the pandemic, but Jen demonstrated a solid grasp of the material in class and on the final exam. She handled the switch from in-person to virtual learning with flexibility and resiliency.

I have no doubt that Jen would be a valuable addition to your chambers. Please don't hesitate to contact me at duryeac@stjohns.edu or 410-746-7606 if I can provide any further information.

Sincerely,

Catherine Baylin Duryea
Assistant Professor of Law

Christopher Borgen
Professor of Law;
Co-Director, Center for International and Comparative Law

St. John's University School of Law
8000 Utopia Parkway
Queens, N.Y. 11439
Phone (718) 990-1982
borgenc@stjohns.edu

September 3, 2020

Your Honor:

I write in support of the candidacy of Jennifer Hopkins for a clerkship in your chambers. Jen has distinguished herself in her classes and in her activities. I believe she would be an excellent law clerk and I recommend her to you without reservation.

I first got to know Jen as one of my students in the first-year courses *Contracts I* and *Contracts II*. At the end of her first year, Jen became a Student Fellow in our Center for International and Comparative Law (CICL), of which I am Co-Director.

CICL Student Fellows, who are chosen via a competitive application process, play a central role in the Center's programming, research, and other activities. Applicants must demonstrate interest in the study and practice of international law, have a strong academic record, and superior writing skills. Student Fellows must complete required courses to deepen and broaden their substantive knowledge in international and comparative law, meet throughout the year for colloquia and guest speakers, and, in their 3L year, present a scholarly paper in the Student Fellows' Roundtable, where it will be critiqued by the other Fellows, affiliated faculty, and other interested members of the law school community. Student Fellows are also required to devote time to a related co-curricular activity.

In her 2L year, Jen dove into her CICL coursework, earning outstanding grades in the fall semester. In the spring semester of that year, all Law School classes were pass/fail due to the pandemic. Jen was my student in *International Environmental Law* that semester and I could

rely on her to have perceptive comments in class discussion, showing engagement with the material. Coursework included current issues in the regulation of cross-border air pollution, the management of the ocean environment, the protection of international freshwater resources, and international responses to climate change. Students considered regulatory design, international dispute resolution, and the relationship of scientific evidence to policymaking. I was consistently impressed with Jen's preparation and class discussion.

Jen was also an outstanding Teaching Fellow for me for the course *Introduction to Law*. True to its name, the course is an overview for 1L's of law, the U.S. legal system, legal education, and the profession. Classes run three hours per day, five days a week, for two weeks. Over that time, students in my section wrote a case brief, an issue analysis, a practice essay exam, and a short essay related to statutory interpretation. Jen and the other Teaching Fellows wrote comments on the student papers. Jen's feedback was excellent: detailed, helpful, and encouraging, but also constructively critical, when needed. The level of care and diligence she displayed on a very tight timeframe further reinforces my opinion that she would be an excellent law clerk. Moreover, during Q&A sessions that the students had with the Teaching Fellows, Jen gave thoughtful answers to their queries that ranged from technical questions about the homework to requests for advice about how to survive law school. Her advice showed both maturity and empathy. I am certain the students learned a great deal from her as a Teaching Fellow.

Litigation is clearly of great interest to Jen. She was a finalist in the Law School's Mollen Moot Court Competition and is a member of the Moot Court Honor Society. In her 2L year, I selected her to be on St. John's Jessup International Law Moot Court Team, one of the activities under CICL's auspices. Jessup is a global competition, simulating fictional disputes between countries before the International Court of Justice. Cases cover issues such as human rights, the interpretation of treaties, the use of military force, and other aspects of public international law. Teams prepare oral and written pleadings arguing both the applicant and respondent positions of the case. Although she was one of the junior members of the team as a 2L, Jen took the initiative in helping organize practice sessions and meetings. The team competed in the regional competition for the Northeast United States, but was not one of the top two teams to advance to the International Rounds. This year, as a 3L, she is now the Captain of the Jessup Team and will coordinate the brief writing and the preparations for the oral rounds, which will be all online this year.

I know that Jen wants to pursue a career in complex civil litigation and hopes to continue on that path by clerking. I believe that she is at the start of an impressive legal career and that her combination of intelligence, analytical and writing skills, maturity, and professionalism will make her an outstanding law clerk. I recommend Jen Hopkins to you without reservation.

If I can be of any further assistance, please do not hesitate to contact me. I can be reached most easily via e-mail to borgenc@stjohns.edu or via my cell at 201-704-7681.

Best regards,

Christopher J. Borgen
Professor of Law and
Co-Director, Center for International and Comparative Law
St. John's University School of Law

8000 Utopia Parkway, Queens, NY 11439

Margaret E. McGuinness
Professor of Law
Co-Director, Center for International and Comparative Law

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Tel (718) 990-8018
Fax (718) 990-8300
mcguinnm@stjohns.edu

September 3, 2020

Dear Your Honor::

I write today, with great enthusiasm, to recommend Jennifer Hopkins for a clerkship in your chambers. I have known Jennifer for over a year, when she was selected for a competitive fellowship with the Center for International and Comparative Law (CICL). Since that time, I have come to know her well as a student, a research assistant, and a leader at St. John's and across law schools in New York. She has the intellectual firepower and research and writing skills to succeed as a clerk. And her passion for justice and her organizational and leadership skills set her apart from her classmates.

In my International Law course last year, Jennifer earned one of the top grades in the class (an A) and stood out in a large class as consistently prepared and agile in analyzing complex doctrine and problems. I was particularly impressed by her clarity and concision when navigating complicated issues at the intersection of multiple legal systems, a skill that will serve her well as a clerk. As a CICL fellow, she helped us develop a programming and communications strategy. As a research assistant, she researched and compiled bibliographic content for an edited volume on law and diplomacy. She navigated three different academic disciplines and compiled and organized the content on a new database platform. Her research and writing skills are superb. Most important, she worked well with her co-research assistant, stepping into the breach to salvage his work when he encountered technical difficulties and ensuring that the final product was complete, coherent and accessible to me and my co-editor.

Our school year was interrupted by the pandemic, but Jennifer did not miss a beat. She continued to do great academic work and remained fully engaged in the co-curriculars of the Law School and the Center, including in important leadership positions. Toward the end of the school year, when the killing of George Floyd and the inequities of the impact of the Covid-19 crisis in New York City created an inflection point for the profession, Jennifer was one of a half-dozen student leaders in New York state who coordinated a state-wide effort toward police reform. The result of their efforts was the New York state legislature's repeal of a law shielding police disciplinary records from public review. It is not often that students are able to participate in meaningful legal reform; It was all the more impressive for being done under the stress of the pandemic, as the *New York Law Journal* later recognized in an article featuring her work.

I have heard from several rising 1Ls who have contacted me about student fellowships at the Center or about a course of study in international law that they "heard about it from Jen Hopkins." That is Jen in a nutshell: a skillful, passionate and compassionate advocate, whose enthusiasm for the law and justice inspires others. She will be an asset to your chambers. Please do not hesitate to contact me if you require any further information about her candidacy.

Sincerely,

Margaret E. McGuinness

Jeff Sovern
Professor of Law

Tel 718-990-6429
Fax 718-990-8300
sovernj@stjohns.edu

St. John's University
School of Law
8000 Utopia Parkway
Queens, NY 11439
www.stjohns.edu

July 31, 2020

Dear Your Honor:

I write to recommend Jennifer Hopkins for a clerkship. Ms. Hopkins took my course in Civil Procedure during the Fall of 2018. Based upon her success in the course, her subsequent performance as my Teaching Assistant, and her extracurricular activities, I am pleased to recommend her. Ms. Hopkins will be a very good law clerk.

Though only a rising third-year law student, Ms. Hopkins has already had an impact on the law of New York and perhaps even public safety. After the death of George Floyd, Ms. Hopkins learned that police misconduct records were less available to the public in New York than in nearly every other state, thanks to New York Civil Rights Law § 50-a. Ms. Hopkins drafted a petition calling for repeal of the statute and began circulating it. Within days, she had drawn nearly 2000 signatures from professors and students at every law school in New York. Soon after that, New York amended the statute. The New York Law Journal reported on her petition in a June 09, 2020 story by Jason Grant, Students, Faculty From All 15 NY Law Schools Signed Petition Calling for Repeal of Section 50-a.

As that story suggests, Ms. Hopkins is both a self-starter and someone who cares deeply about the public interest. Indeed, she was one of only four St. John's law students awarded a Catalyst Public Interest Fellowship last summer. She used the Fellowship to finance her internship with Presiding Justice Alan D. Scheinkman, of the Appellate Division, Second Department of the State of New York where she performed tasks that will be familiar to every law clerk, including research and writing. Ms. Hopkins is that rare law student who has worked in all three branches of government: the executive, where she served in the White House; the legislative, where she interned for a member of Congress; and last summer, the judiciary. Nor is that the extent of her work to help the public. While still in her first-year, she took breaks from studying to volunteer to help consumers being pursued by debt collectors at the Civil Legal Advice and Resource Office (CLARO). As a second-year student, she aided other law students with their writing while serving as a Writing Consultant for our Writing Center—an honor reserved for the best writers among our student body.

Ms. Hopkins has also devoted considerable time to traditional extracurricular activities at the law school. Law Review service and competing in the Moot Court are both extremely time-consuming, so it is unusual for students to try both. Ms. Hopkins not only attempted both, she excelled at both. She has been elected a Senior Articles Editor for the Law Review, while she was one of only four finalists in our premier internal moot court competition, the Milton Mollen Moot Court Competition. She knows both how to write about the law and how to advocate for what it should be.

In addition, Ms. Hopkins has performed ably in the classroom. Her Civil Procedure exam answer was excellent and earned her an A- and she ranks in the top fifth in her class. I suspect that if she were less engaged in her many other activities, she would rank even higher, but she is not someone who is willing to let her classes get in the way of her education.

When it came time to hire teaching assistants for Civil Procedure last year, Ms. Hopkins was an easy choice. Before hiring TAs, I check with their Legal Research and Writing professors because it is difficult for me to assess writing ability from a Civil Procedure exam. Ms. Hopkins's Legal Writing professor sung her praises and urged me to hire her. I did, and now I recommend that you do the same. You will not be disappointed.

In sum, I am confident Ms. Hopkins will be a hard-working, talented law clerk who will require little guidance. I am very happy to recommend her.

Respectfully,

Jeff Sovern
Professor of Law

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- x
ALEXIS LAGO,

Plaintiff, :

v. : Civil Action No. 18-cv-5192

TECHIE TROOP, CORP.,

Defendant. :

----------x

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Jennifer Hopkins

INTRODUCTION

Alexis Lago is a UCLA computer science graduate. She was hired by Techie Troop right after graduation. Ms. Lago loved her job as an on-site service technician. But after 3 years of hard work and dedication, Ms. Lago was demoted to a less prestigious unit. This demotion followed shortly after Ms. Lago made a discrimination complaint against her boss, Elias Greene. Greene was visibly uncomfortable after Ms. Lago came out as a transgender person and informed him of her gender reassignment surgery. Ms. Lago has filed this present action because Defendant retaliated against her for reporting Greene's wrongful conduct.

The Court should deny Defendant's motion for summary judgment because there are numerous issues of material fact. First, Ms. Lago is able to establish the elements necessary for a prima facie case of retaliation. Second, Ms. Lago is able to show that Defendant's asserted "legitimate" reason for the demotion is just a pretext for retaliation. At the very least, Ms. Lago presents genuine issues of material fact that should be left to a jury. Accordingly, Defendant's motion for summary judgment should be denied.

STATEMENT OF FACTS

Ms. Lago was hired by Techie Troop as an on-site service technician in the Los Angeles office. (Lago Dep. at 2:7-11.) In 2016, she transferred to the Long Island City office and worked directly under Elias Greene (*Id.* at 2:22-30.) Ms. Lago was always a hardworking employee. (*Id.* at 10:29-30.) She never had any problems with her attendance, work performance, or customer complaints. (*Id.* at 10:30-33.)

A. Coming out: "What will customers say? I think they would be uncomfortable."

In 2017, Ms. Lago began to take steps to transition from male to female. (Am. Compl. ¶ 17.) In January 2018, Ms. Lago came out as transgender to Greene and informed him of her upcoming

gender reassignment surgery. (Lago Dep. at 3:15-18.) Greene responded by telling Ms. Lago how uncomfortable he was:

> How is that going to work with your job now that you are suddenly going to change your sex? How are we supposed to know how to treat you or what to call you? What will customers say? I think they would be uncomfortable. Have you thought about maybe asking for reassignment to a desk position somewhere in the company? You could do on-line support instead of on-site.

(Am. Compl. ¶ 19.) Ms. Lago repeatedly told Greene that she preferred on-site work, as she had been an employee in that department for the last three years. (Greene Dep. at 10:19-21.) She noted that she did not like the over-the-Internet department because it involved menial tasks and less social interaction. (Lago Dep. at 5:15-19.) The over-the-Internet technicians exercised less responsibility; if they could not solve a problem, they had to pass it on to the on-site technicians. (Lago Dep. at 11:12-20.) Additionally, the over-the-Internet technicians were subject to a different pay raise structure and received a salary of about $5,000 less. (Tam Dep. at 10:15-20.)

B. Post-op discrimination: Ms. Lago was not assigned work because of "that operation."

Ms. Lago took medical leave for her gender reassignment surgery in February 2018. (Am. Compl. ¶ 21.) She returned to work in April 2018. (Davis Dep. at 3:29.) She was medically cleared but constantly assigned to low-level over-the-Internet service jobs. (Lago Dep. at 4:12-18.) She approached Greene about this, and he responded that there were no available onsite jobs. (Greene Dep. at 12:5-7.) Greene kept assigning Ms. Lago to the over-the-Internet department, knowing full well how much she disliked it. (Lago Dep. at 3:31-37.) Two days later Ms. Lago overheard coworkers complaining about being overworked. (*Id.* at 5:1-5.) They referred to Ms. Lago as "his highness or should we say her highness" who didn't pitch in with the work assignments. (*Id.* at 5:7-8.) Again, Ms. Lago approached Mr. Greene. (*Id.* at 5:13.) He admitted that he was not comfortable assigning her on-site service jobs because she had just came back from "that operation." (Greene

Dep. at 12:21-23.) Greene was uncomfortable even though Ms. Lago was a fully competent, medically cleared employee. (Davis Dep. at 3:35-38.)

C. The complaint: "it felt wrong and it was wrong."

On May 8, 2018, Ms. Lago made a complaint about Greene's discrimination to Julianna Davis, an Employee Relations Specialist. (Davis Dep. at 4:16.) Ms. Lago told Davis, "it felt kind of like discrimination . . . it felt wrong and it was wrong." (Lago Dep. at 6:25-30.) Following this conversation, Davis decided to involve her boss, Leslie Groves. (Davis Dep. at 6:12-17.) Ms. Lago again explained how upset she was over Greene's conduct. (*Id.* at 6:23-24.) Groves and Davis responded by promising to investigate the matter and speak to Greene. (*Id.* at 7:21-22.) The next day, Greene assigned Ms. Lago an on-site tech service job for the first time since she returned from medical leave. (Lago Dep. at 7:14.) For the next three months, Ms. Lago received on-site assignments, but she did not as many as her colleagues did. (Am. Compl. ¶ 26.)

D. The retaliation: Ms. Lago was "different."

On August 27, 2018, Greene confronted Ms. Lago regarding her use of the company car for personal reasons. (Ex. 3.) Greene explained to Ms. Lago that he had to report her in accord with company policy. (Ex. 1.) However, Greene is aware of many previous violations[1] of the same policy by other employees. (Greene Dep. at 21:1-11.) And Greene has never reported another employee for this. (*Id.* at 21:12-14.) Greene says otherwise "corporate would get annoyed." (*Id.* at 23:13.) But Greene felt it was "different" with Ms. Lago. (*Id.* at 21:19-21.) Ms. Lago was permanently transferred to the over-the-Internet department on August 29, 2018, just three months after her discrimination complaint. (Ex. 2.)

[1] Other on-site techs that violated the policy include Jaxon, who ran errands, and Barbara, who picked up her children from day care. Both techs used the car and violated the policy on a daily basis. (Lago Dep. at 9:12-20.)

LEGAL STANDARD

The Court should deny summary judgment under Federal Rule of Civil Procedure 56(a) unless the defendant can show "that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010). In determining if there is a genuine issue, the Court is required to "draw all permissible factual inferences in favor of the [nonmoving] party." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (vacating summary judgment on plaintiff's retaliation claim because inferences were drawn in favor of plaintiff to establish a genuine issue of material fact). The Court should only affirm summary judgment if it appears, beyond doubt, that the "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kirkland v. Cablevision Sys.*, 760 F.3d 223, 225 (2d Cir. 2014) (vacating summary judgment on a retaliation claim because a reasonable jury could decide to "credit all of [plaintiff's] evidence, some of it, or none at all" but that is "left for the jury to decide at trial").

ARGUMENT

I. The Court Should Deny Defendant's Motion For Summary Judgment Because Lago Establishes a Genuine Issue of Material Fact.

The Court should deny Defendant's motion for summary judgment. Defendant fails to establish that there is no genuine issue of material fact, thus Lago is entitled to take her case to trial. "Title VII forbids an employer to retaliate against an employee for, *inter alia*, complaining of employment discrimination." *Kessler v. Westchester County Dep't of Soc. Serv.*, 461 F.3d 199, 205 (2d Cir. 2006). Lago's Title VII retaliation claim is analyzed under the *McDonnell Douglas* burden-shifting standard. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). First, Lago must state her prima facie case of retaliation. *McDonnell Douglas Corp.*, 411 U.S. at 802. Once she successfully establishes a prima facie case, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Gorzynski*, 596 F.3d at 110. If Defendant carries that burden,

Lago can defeat summary judgment by providing evidence that the non-retaliatory reason is a mere pretext for retaliation. *Kwan v. Andalex Group*, 737 F.3d 834, 844 (2d Cir. 2013).

Defendant's motion for summary judgment fails for two reasons. First, Lago is able to establish a prima facie case of retaliation, and there are genuine issues of material fact for each element. Second, Lago is able to establish that the "legitimate reason" proffered by Defendant is just a pretext. Because Lago is able to establish genuine issues of fact, the motion for summary judgment should be denied. *See Cifra*, 252 F.3d at 218 (vacating summary judgment because there was sufficient evidence in which a rational factfinder could find defendant's explanation was a pretext for retaliation).

A. Lago Establishes a Prima Facie Case of a Retaliation Claim With The *McDonnell Douglas* Elements.

To state a prima facie case of retaliation, Lago must proffer evidence that satisfies four elements. She must establish that (1) she participated in a protected activity; (2) Defendant knew of her involvement with the protected activity; (3) Defendant took an adverse action against her; and (4) there is a causal connection between the protected activity and the adverse employment action. *Cifra v. General Electric Co.*, 252 F.3d 205, 216 (2d Cir. 2001).

1. Lago Engaged in a Title VII Protected Activity.

Protected activity under Title VII refers to any action taken "to protest or oppose statutorily prohibited discrimination." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 560 (2d Cir. 2000) (holding that protected activity includes making complaints to management and protesting against discrimination). In order to prevail on a retaliation claim, the plaintiff only needs to prove she was motivated by a "good faith, reasonable belief" that the underlying employment practices were unlawful. *Kessler*, 461 F.3d at 206 (finding plaintiff participated in protected activity by challenging unlawful employment practices under Title VII); *McMenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001) (same).

Lago participated in a protected activity.[2] She made a discrimination complaint with the good faith and reasonable belief that Greene was acting unlawfully. *See, e.g.*, *Kwan*, 737 F.3d at 843 (holding that plaintiff met the protected activity element because she challenged unlawful employment practices in good faith); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998) (finding plaintiff established good faith through evidence of communications with her employer about unlawful conduct). Lago provides the following[3] to show her discrimination complaint was made in good faith:

- In January 2018, Lago informed Greene that she was a transgender person in the process of transitioning;
- Greene responded by making comments about being uncomfortable, "How are we supposed to know how to treat you or what to call you? What will customers say? I think they would be uncomfortable";
- Lago returned to work in April 2018, following her gender reassignment surgery, and Greene did not assign her to any on-site jobs,
- Greene explained there were no available on-site jobs;
- Greene only assigned Lago to over-the-internet jobs;
- Lago expressed to Greene how much she disliked the over-the-internet department;
- In May 2018, Lago overheard coworkers complaining about being overworked with on-site jobs;
- In May 2018, Lago overheard coworkers referring to her as "his highness or should we say her highness" after Lago was not assigned on-site jobs;
- Lago approached Greene again and he explained he was uncomfortable assigning her to the on-site jobs; and
- Two days later, Lago made a complaint to Julianna Davis in the LIC Human Resources department about the discrimination she felt she was facing from Greene based on the denial of opportunities to work in the on-site department.

Accordingly, Lago made a discrimination complaint in good faith, which is considered protected activity under Title VII. *See Kessler*, 461 F.3d at 206 (holding plaintiff met good faith standard by showing that defendant specifically denied plaintiff work opportunities, but granted his other

[2] The District Court found that Title VII does not extend to discrimination against transgender individuals, but this is irrelevant in Lago's retaliation claim. (Order Dismissing Pl.'s Title VII Discrimination Claim at 2.) The Court only needs to consider if the complaint was reasonably made in good faith.

[3] Lago Dep. 3:15-19, 3:21-28, 4:5-7, 4:25-26, 4:16-18, 5:15-19; 5:1-5, 5:6-7, 5:21-23, 5:30-32.

coworkers those opportunities); *see also McMenemy*, 241 F.3d at 285 (holding plaintiff participated in a protected activity because he presented nonfrivolous arguments that unlawful employment practices occurred in the workplace). Lago provides sufficient evidence to establish at least a dispute of material fact to defeat summary judgment. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (denying summary judgment because a jury could reasonably conclude that plaintiff made a good faith claim against unlawful employment practices under Title VII).

2. Defendant Had Knowledge of Lago's Discrimination Complaint.

In order to satisfy the knowledge requirement of a prima facie claim for retaliation, courts require corporate knowledge that the plaintiff has engaged in a protected activity. *See, e.g.*, *Kessler*, 461 F.3d at 210 (holding that the knowledge element was satisfied when plaintiff submitted a complaint directly to his employer). Corporate knowledge is sufficient because otherwise a simple denial by a corporate officer would prevent the plaintiff from satisfying the prima facie elements. *See Kwan*, 737 F.3d at 844 (finding that defendant was aware of plaintiff's protected activity because plaintiff made a discrimination complaint to an officer of the company).

Here, Defendant had knowledge of Lago's concerns and complaints about the discrimination she was facing from Greene. Lago made a complaint on May 8, 2018 to Davis, who involved her boss, Leslie Groves. (Davis Dep. at 6:12-25.) Lago told Davis and Groves that she was upset she was not getting assigned to any on-site jobs. (Lago Dep. at 6:25-30.) Lago further explained that she thought it might have something to do with being transgender. (Lago Dep. at 6:9-13.) Both Davis and Groves conferenced with Greene about his conduct and explained that he should assign Lago more on-site jobs. (Davis Dep. at 8:2-30.) Accordingly, Greene, Davis, Groves, and Techie Troop as a whole had knowledge of Lago's protected activity. *Reed*, 95 F.3d at 1178 (finding knowledge requirement "easily proved" because the employer was aware of plaintiff's complaints).

3. Defendant Took An Adverse Employment Action Against Lago By Demoting Her To A Less Prestigious Unit.

Under Title VII, it is unlawful for an employer to "adversely affect" an employee's status. 42 U.S.C. §2000e-3(a). An adverse employment action is one that "results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career." *Kessler*, 461 F.3d at 207. A transfer can be considered adverse employment, especially where the plaintiff was transferred from an "elite" unit to one that was "less prestigious." *Id.* (finding that plaintiff was adversely affected by his employer when he was reassigned to a unit with less discretionary power). The Supreme Court held a plaintiff can prove an employment action is adverse by showing the action might have dissuaded a reasonable worker from making a discrimination complaint. *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006) (holding an action was adverse because "[a] reasonable employee facing the choice between retaining her [current job] and filing a discrimination complaint might well choose the former.")

Here, Defendant took an adverse employment action on August 29, 2018 by officially transferring Lago from the on-site services department to the over-the-Internet department. Lago was hired in 2015 as an on-site technician, not an over-the-Internet technician. This transfer was a demotion to a less prestigious unit "because it required less skill." (Am. Compl. ¶ 30.) Working in the over-the Internet department involves menial tasks and the technicians receive a salary of at least $5,000 less. *See Kessler*, 461 F.3d at 209 (holding that plaintiff's transferred unit was "less prestigious" because it stripped him of responsibilities and his power to exercise discretion); *Galabya v. NYC Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (holding that a demotion could be evidenced by a decrease in wage or salary).

Lago said to Greene on numerous occasions that she viewed working in the over-the-Internet department negatively, as it was much slower and the work involved limited social interaction. *Terry*, 336 F.3d at 144 (holding that plaintiff's transfer was a demotion because it was

"accompanied by a negative change in the terms and conditions of employment" including low-level ministerial work). A reasonable employee would be dissuaded from making a discrimination claim knowing she could be transferred from the elite on-site department to the less prestigious over-the-Internet department. *See Burlington*, 548 U.S. at 68. Lago is able to defeat summary judgment here because there is at least dispute of material fact of how a reasonable employee would view this transfer. *Id.* (denying summary judgment because a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee).

4. There Is A Causal Connection Between Lago's Discrimination Complaint And Her Demotion.

A plaintiff can establish a causal connection directly "through evidence of retaliatory animus." *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993). However, a plaintiff can also establish a causal connection indirectly "by showing that the protected activity was closely followed in time by the adverse action." *Cifra*, 252 F.3d at 217 (holding that plaintiff established a causal connection through temporal proximity). However, there is no bright line that defines "the outer limits beyond which a temporal relationship is too attenuated to establish causation." *See, e.g., Gorzynski*, 596 F.3d at 110 (holding that one month between the protected activity and adverse employment action established a causal relationship); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001) (five months); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45–46 (2d Cir. 1980) (eight months).

Here, Lago made her discrimination complaint to Davis on May 8, 2018. (Davis Dep. at 4:16.) She was transferred from the on-site service department to the over-the-Internet service department on August 29, 2018. (Ex. 2.) There were only three months in between the discrimination complaint and the adverse employment action. *See Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 160 (2d Cir. 2006) (holding three months between protected activity and adverse action established a causal relationship). Through this close temporal proximity, Lago is able

to establish the causal connection between her protected activity and the adverse employment action. *See Quinn*, 159 F.3d at 769. Summary judgment should be denied because Lago has proven at least a dispute of material fact here. *Id.* (denying summary judgment because plaintiff proffered sufficient evidence of close temporal proximity to show a causal connection between her protected activity and adverse employment action).

B. Defendant's "Legitimate" Reason For The Adverse Employment Action Is Just A Pretext For Retaliation.

Under the *McDonnell Douglas* framework, after the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to articulate a non-retaliatory reason for the employment action. *See Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005); *see also McDonnell Douglas*, 411 U.S. at 802. If the defendant offers an explanation, the plaintiff can show that the explanation offered is merely a pretext for retaliation. *Gorzynski*, 596 F.3d at 111 (holding that plaintiff produced sufficient evidence to cast doubt on defendant's "legitimate, nondiscriminatory reason" to defeat summary judgment). A plaintiff can satisfy this burden by "demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered reasons for its action." *Kwan*, 737 F.3d at 846 (vacating summary judgment because defendant's "legitimate" explanations were inconsistent and could be reasonably concluded as a pretext); *see also Jute*, 420 F.3d at 770 (finding inconsistencies because the testimony the defendant relied on to proffer a "legitimate" reason was from the alleged discriminator).

Lago is able to provide evidence that casts significant doubt on Defendant's "legitimate" explanation. *See Kirkland*, 760 F.3d at 225 (vacating summary judgment because plaintiff produced sufficient evidence for a reasonable fact-finder to conclude that defendant's rationale is a mere pretext for illegal retaliation); *see also Terry*, 336 F.3d at 143 (same). Defendant's rationale for demoting Lago is that she violated the company car policy. (Ex. 1.)

Lago was always considered to be a diligent and hardworking employee. (Lago Dep. at 10:29-33.) She never had any problems with her work performance, never received any customer complaints, and was never reported for being absent or late. *Cifra*, 252 F.3d at 218 (finding that defendant's "legitimate" explanation was questionable because plaintiff was always considered to be an "excellent" employee with "excellent" skills). Lago used the company car, for a personal reason, one time. (Lago Dep. at 9:12- 20.) Lago knew that her coworkers frequently violated this policy. (Lago Dep. at 9:12-20.) It was well known that many employees used the company cars for various personal reasons. (Greene Dep. at 21:3.) Specifically, Jaxon used the company car to run errands, and Barbara used the company car to pick up her children from day care. (Lago Dep. at 9:12-20.) Both techs used the car on a daily basis. Both techs violated the policy. (Ex. 1.)

Elias Greene was aware of these constant violations but chose not to report them. (Greene Dep. at 21:1-14.) Greene rarely reported his employees because "corporate would get annoyed." (Greene Dep. at 23:13.) However, Greene said it was "different" with Lago and treated her differently than he treated Jaxon and Barbara. *Gordon v. NYC Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000) (holding that a pretext could be inferred from "circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct"); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1309 (2d Cir. 1995) (finding defendant's rationale questionable because he treated coworkers, who broke the same policy, differently than plaintiff).

This statement, and subsequent demotion, occurred only three months after Lago made a discrimination complaint against Greene. *See Quinn*, 159 F.3d at 770 (holding that a strong temporal connection between the plaintiff's complaint and other circumstantial evidence is sufficient to raise an issue of fact with respect to pretext). Thus, Defendant has failed to offer a legitimate reason for the adverse employment action, so their motion for summary judgment should be denied. *Kirkland*,

760 F.3d at 227 (finding that plaintiff's proffered evidence supported a finding of pretext that is "left for the jury to decide at trial").

CONCLUSION

For the foregoing reasons, Ms. Lago respectfully requests that the Court deny Defendant's Motion for Summary Judgment in its entirety.

DATED this 12th day of April, 2018.

Respectfully submitted,
/s/ Jennifer Hopkins
Jennifer Hopkins
Counsel for
Plaintiff Alexis Lago

I certify that I have complied with all instructions and policies for this assignment. Jennifer Hopkins.

Applicant Details

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Applicant Education

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Date of BA/BS	**June 2011**
JD/LLB From	**Brooklyn Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009**
Date of JD/LLB	**May 21, 2021**
LLM From	**Pace University School of Law**
Date of LLM	**May 14, 2022**
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Law Review/ Journal	**Yes**
Journal(s)	**Journal of Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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April 10, 2022

The Honorable Elizabeth W. Hanes, Magistrate Judge
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a 2021, *magna cum laude*, graduate from Brooklyn Law School (BLS) and a current Environmental Law LLM Graduate Fellow at the Elisabeth Haub School of Law at Pace University (Pace Law). I am writing to express my interest in the 2022-2023 term clerkship in your chambers.

I will bring finely honed practical research and writing skills, as well as the broader refined professional skills that the challenging work of a law clerk demands, developed though my academic training and my unique professional experiences. I graduated from BLS in June 2021, earning my JD as a part-time student while working as the full-time Operations Coordinator for the New York State Academy of Trial Lawyers (Academy). My Note, which argues for governments' affirmative duty to protect private citizens from harm due to exposure to pollutants, was published in the BLS JOURNAL OF LAW AND POLICY, on which I served as an Articles Editor. While at law school, I interned with the New York Legal Assistance Group's Federal Legal Clinic, where I counseled pro se litigants on filing civil claims in federal court and complying with court rules and deadlines. I also interned at a private firm, conducting comprehensive legal research and drafting legal memoranda on complex issues including the potential for applying the "corporate complicity" and successor liability doctrines in Child Victims Act cases.

I have a strong work ethic and demonstrated research, writing, and organizational skills. As the Environmental Law LLM Graduate Fellow at Pace Law, I am responsible for supporting the Environmental Law Program in its activities both on and off campus. For example, I wrote the Bench Memorandum provided for those who graded and judged the Jeffrey G. Miller National Environmental Law Moot Court Competition (NELMCC), hosted at Pace Law. I also edited the complex NELMCC Problem, judged two preliminary rounds of the competition, and organized the presentation of the final round. Beyond my NELMCC duties, I am supervising the legal research and writing assignments of six undergraduate students as part of the law school's new "Research Experiences for Undergraduates" (REU) program.

As a part-time law student, working full-time, I developed the successful time management skills and sharp attention to detail required in a highly professional setting. I would be honored to apply these skills as a law clerk in your chambers.

Thank you for your consideration.

Respectfully,
Katherine Horner

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EDUCATION

Elisabeth Haub School of Law at Pace University (Pace Law), White Plains, NY
Candidate for LLM in Environmental Law, expected May 2022 (Full Tuition Scholarship)

Brooklyn Law School, Brooklyn, NY
Juris Doctor, *magna cum laude*, June 2021
Honors: Articles Editor, JOURNAL OF LAW AND POLICY; Phi Delta Phi Legal Honor Society; Prince Scholarship
Note: *"A Climate of Lawlessness": Upholding a Government's Affirmative Duty to Protect the Environment Using* DeShaney *'s Special Relationship Exception*, 29 J.L. & POL'Y 285 (2020)

Chatham University, Pittsburgh, PA
Master of Arts in Psychology, May 2017
Honors: Chatham University Academic Integrity Committee

Macaulay Honors College at CUNY Hunter, New York, NY
Bachelor of Arts in Psychology, *magna cum laude*, May 2011
Honors: Full Merit Scholarship; Honors Thesis: *The Influence of Religion on Parental Practices*

LEGAL EXPERIENCE

Pace Law, White Plains, NY, *Environmental Law LLM Graduate Fellow***,** Aug. 2021-May 2022
Drafted bench memorandum, edited competition problem, judged two preliminary rounds, and organized presentation of the final round of the National Environmental Law Moot Court Competition (NELMCC). Work with Food Law Initiative to improve social media presence and expand food and agriculture law-related academic programs. Co-supervise six student projects for Pace Law's "Research Experiences for Undergraduates" program. Hosted the 2022 Gilbert and Sarah Kerlin Lecture on Environmental Law.

Federal Legal Clinic (SDNY) at New York Legal Assistance Group, New York, NY, *Legal Intern*, Jan.-May 2021
Conducted initial intake interviews and advised low income/indigent clients seeking help with civil rights violations and housing and employment discrimination under attorney supervision. Interviewed clients to gather facts for written submissions to the federal court. Wrote internal legal memoranda and conducted extensive legal research for client cases.

Bonina & Bonina, P.C., Brooklyn, NY, *Legal Intern*, Sept.-Dec. 2020
Supported attorneys in Child Victims Act litigation. Conducted comprehensive research and wrote internal legal memoranda applying "corporate complicity" and successor liability doctrines in child sex abuse litigation.

OTHER PROFESSIONAL & VOLUNTEER EXPERIENCE

New York State Academy of Trial Lawyers, Brooklyn, NY, *Operations Coordinator*, 2017-2021
Organized and supervised continuing legal education courses for attorneys, judges, and other legal professionals across New York State. Managed office administrative tasks including registering and assisting members, designing and scheduling email blasts announcing Academy events and state court updates, and managing Academy website.

Chatham University, Pittsburgh, PA, *Faculty Research Assistant*, 2015-2017
Assisted with quantitative and qualitative analyses, including conducting literature reviews, transcribing participant interviews, and utilizing Grounded Theory methodology. Presented research poster on female athletes' perceptions of male coaching behaviors at Association for Women in Psychology 2017 Conference.

New York Public Interest Research Group, Albany, NY, *Legislative Associate*, 2011-2012
Authored and presented seminar on carcinogenic chemicals in personal care products. Conducted literature review and edited final manuscript reporting hospital visiting policies: *Sick, Scared, and Separated from Loved Ones: A Report on NYS Hospital Visiting Policies and How Patient-Centered Approaches Can Promote Wellness and Safer Healthcare* (acknowledged for research and editing contribution). Authored public policy memoranda. Led lobby visits to Capitol.

U.S. Committee for Refugees and Immigrants, Albany, NY, 2017 (prepared apartments & donations for refugees)
Shambhala Mountain Center, Red Feather Lakes, CO, July 2011 (meal prep for Buddhist retreat participants)

Print Date: 06/13/21

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Class: GR

	Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
	Fall 2018					
CPL 102 E1	Civil Procedure	5.00	A-	5.00	18.35	R. Effron
LWR 100 E1	Fundamentals of Law Practice	2.00	B+	2.00	6.66	T. Driscoll
TRT 100 E1	Torts	4.00	A-	4.00	14.68	A. Bernstein
Sem GPA 3.608	Cum GPA 3.608	11.00		11.00	39.69	
	Spring 2019					
LWR 101 E1	Fundamentals of Law Pract. 2	2.00	A-	2.00	7.34	T. Driscoll
CTL 100 E1	Contracts	5.00	A	5.00	20.00	M. Gerber
CLT 100 E1	Constitutional Law	5.00	A	5.00	20.00	D. Gewirtzman
Sem GPA 3.945	Cum GPA 3.784	12.00		12.00	47.34	
	Summer 2019					
CRM 100 E1	Criminal Law	4.00	B+	4.00	13.32	J. Pfaff
LWR 230 E2	Fundamentals of Legal Draftin	2.00	A @	2.00	8.00	L. Esbrook
Sem GPA 3.553	Cum GPA 3.736	6.00		6.00	21.32	
	Fall 2019					
ICL 231 E1	Clim Chge, Econ Dev Hum Right	2.00	A+	2.00	8.66	S. Kass
CLT 210 D1	Civil Rights Law	3.00	A	3.00	12.00	B. Azmy
PTE 100 E1	Property	4.00	A	4.00	16.00	G. Macey
LWR 330 D1	Journal of Law & Policy	2.00	P	2.00	0.00	J. Sinder
Sem GPA 4.073	Cum GPA 3.816	11.00		11.00	36.66	

			Spring 2020					
BOL	200	D1	Corporations	4.00	P	4.00	0.00	A. Gold
CRM	201	E1	Crim. Pro: Adjudication	3.00	P	3.00	0.00	S. Caplow
CPL	200	E1	Evidence	4.00	P	4.00	0.00	J. Macleod
LWR	330	D1	Journal of Law & Policy	1.00	P	1.00	0.00	J. Sinder
Sem GPA 0.000			Cum GPA 3.816	12.00		12.00	0.00	

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Credits Attempted: 85 Credits Completed: 85 Credits toward GPA: 61 GPA Grade Points: 228.36
GPA: 3.744
Comments: @ indicates successfully completed UCWR. SK indicates successfully completed Skills Requirement.
END OF COMMENTS

Print Date: 06/13/21

Ms. Katherine G. Horner
205 State Street, Apt. 19J4
Brooklyn NY 11201

Student Name: Katherine G. Horner
Student ID..: 0415533
Class: GR

	Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
	Summer 2020					
BOL 230	E1 Accounting for Lawyers	2.00	A-	2.00	7.34	A. Neumark
CPL 218	D1 Intro. to PI Lawyering	1.00	A	1.00	4.00	D. Sorken, D. Berkman
IPL 225	E1 Cybercrime	3.00	B+	3.00	9.99	L. Sacharoff
LGE 120	E1 Professional Responsibility	2.00	B-	2.00	5.34	M. Ross
Sem GPA 3.334	Cum GPA 3.732	8.00		8.00	26.67	

		Fall 2020					
RLP	200 E1	Administrative Law	3.00	P	3.00	0.00	W. Araiza
CPL	307 E1	Evidence Workshop	2.00	A	2.00	8.00	S. Rosenberg
LWR	270 E1	Appellate Advocacy	2.00	A- @	2.00	7.34	C. Trupp
LWR	330 D1	Journal of Law & Policy	1.00	P	1.00	0.00	J. Sinder
CLN	200 D1	Civil Practice Ext Fieldwork	2.00	HP SK	2.00	0.00	J. Balsam
CLN	201.9 E1	Civ Ext Sem - Solo & Sm Firm	1.00	A	1.00	4.00	D. Dince
Sem GPA 3.868		Cum GPA 3.745	11.00		11.00	19.34	
		Winter 2021					
CPL	326 E1	Civil Discovery - Practicum	1.00	A-	1.00	3.67	T. Driscoll
Sem GPA 3.670		Cum GPA 3.744	1.00		1.00	3.67	
		Spring 2021					
CLT	200 E1	First Amendment Law	3.00	A	3.00	12.00	D. Gewirtzman
RLP	230 D1	Environmental Law	3.00	A-	3.00	11.01	S. Tai
LWR	230.2 E1	Fund. of Legal Drafti.: Litig	2.00	B+ @	2.00	6.66	L. Taeschler
LWR	330 D1	Journal of Law & Policy	1.00	P	1.00	0.00	J. Sinder
CLN	200 D1	Civil Practice Ext Fieldwork	2.00	HP SK	2.00	0.00	J. Balsam
CLN	201.10 D1	Civ Ext Sem - Govt Counsel	1.00	A	1.00	4.00	L. Polishook
Sem GPA 3.741		Cum GPA 3.744	12.00		12.00	33.67	
		Summer 2021					
CPL	217 D1	Intensive Communication Skill	1.00	P	1.00	0.00	N. Cohen
Sem GPA 0.000		Cum GPA 3.744	1.00		1.00	0.00	

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Print Date: 06/13/21

Ms. Katherine G. Horner
205 State Street, Apt. 19J4
Brooklyn NY 11201

Student Name: Katherine G. Horner
Student ID..: 0415533
Class: GR

Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty

Degree Name....: Katherine Grant Horner

Degree Received: Juris Doctor

Degree Date....: 05/21

Honors.....: Magna Cum Laude

END OF THIS TRANSCRIPT

Credits Attempted: 85 Credits Completed: 85 Credits toward GPA: 61 GPA Grade Points: 228.36
GPA: 3.744
Comments: @ indicates successfully completed UCWR. SK indicates successfully completed Skills Requirement.
END OF COMMENTS

April 10, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is my pleasure to write this recommendation in support of Katherine Horner's application for a position as your law clerk.

I am the faculty supervisor for the National Environmental Moot Court Competition (NELMCC) at the Elisabeth Haub School of Law at Pace University, and, as such, I have been responsible for coming up with the preliminary draft of a challenging and complex environmental law problem each year. It is the responsibility of the the NELMCC research assistant to cite-check, critique, and finalize the problem before it is released to the competitors, as well as to draft the NELMCC bench memo for use by the brief graders and oral argument judges during the competition.

As the graduate fellow at Haub Law this year, Ms. Horner was assigned the role as NELMCC research assistant. She has performed this task flawlessly – probably the very best NELMCC research assistant I have worked with over the years. Ms. Horner took a complex, multiparty problem involving the Total Maximum Daily Load provisions of section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), and mastered the factual and legal technicalites posed by the problem, despite having had only a general introuction to the Clean Water Act previously. Ms. Horner identified potential issues and obscure legal authorities pertinent to the problem, including EPA guidance documents, that I was previously unaware of, and integrated these into her analysis of the problem. Ms. Horner turned in drafts of her assignments promptly – often ahead of the deadlinee I set – allowing me plenty of time to review her work.

Ms. Horner finalized the problem well ahead of the deadline for its release, allowing me several opportunities to review and work with her to identify potential glitches, inconsistencies, or typos. As a result of Ms. Horner's careful review and revisions, there were fewer post-release questions from competitors to resolve than usual, and none of the corrections or clarifications that are sometimes required. I could not be more pleased with Ms. Horner's work finalizing the problem.

Ms. Horner's work on the bench memo was similarly outstanding. She submitted early drafts for my review of her general direction and depth of analysis – there is always the tension between the desire for completeness in the bench memo while avoiding excessive length for the volunteer competition judges who are often preparing at the last minute. The bench memo research and drafting process went more smoothly than ever this year, and Ms. Horner's work required much less supervision or reworking than other bench memos in recent years. Ms. Horner writes clearly and concisely, and her research and analysis was thorough and inciteful.

Ms. Horner was also a student in my Environmental Skills/Clean Water Act course this Fall. This practice-related course integrates administrative law and practice with a comprehensive examination of the Clean Water Act regulatory scheme. In this course, I ask each student to adopt a role to play for the entire semester, ranging from lawyers for various interested parties to regulators and even the President of the United States. Ms. Horner chose the role of a lawyer for the Natural Resources Defense Council. This is one of the more important and demanding roles in the class, as NRDC was frequently the plaintiff in the cases we examined and Ms. Horner would be called upon to explain NRDC's legal reasoning and litigation objectives. In this role, Ms. Horner was often called upon to address the application of complex statutory and regulatory requirements to technical factual scenarios. Ms. Horner performed this role superbly; mastering the complex and often technical factual nuances and applying the statutory and regulatory requirements to these facts. Ms. Horner frequently volunteered to explain the evironmental groups' point of view in other cases and class problems as well, and performed superbly in the oral advocacy assignments for the class, including oral argument on a challenge to an EPA final rule.

Ms. Horner is a personable collaborator, as well as a thorough helper. She is mindful of loomng deadlines and loose ends,

Karl Coplan - kcoplan@law.pace.edu - 914-422-4343

and persistent yet tactful in following up. It has been a pleasure to work with her this semester.

As a former law clerk myself (Chief Justice Warren Burger in 1985-1986, Judge Leonard I. Garth, 1984-1985) I can say without qualification that Ms. Horner is highly qualified for the position of judicial law clerk. Any chambers would be lucky to have her. Please feel free to conact me if you have any questions about Ms. Horner's qualifications.

Sincerely,

/s/

Karl S. Coplan

Profesor of Law Emeritus

Elisabeth Haub School of Law

at Pace University

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December 21, 2021

Re: Recommendation for Katherine Horner for a Judicial Clerkship

Dear Judge:

I write this recommendation in support of Katherine Horner's application for a judicial clerkship. I am the Associate Director of Environmental Law Programs at the Elisabeth Haub School of Law at Pace University (Haub Law). Katherine Horner is the Environmental Law LLM Graduate Fellow at Haub Law and I have had the pleasure of being both her faculty advisor and supervisor since September 2021. In this capacity, I have not only overseen Katherine's outstanding work for the school's environmental law program, I have also advised her with respect to her coursework as well as her academic and professional goals.

Since commencing her fellowship at Haub Law, Katherine has proven herself invaluable to the Environmental Law Program's faculty and staff through her dedicated assistance to the multiple facets of our extensive environmental law program. No matter how great or small a task, Katherine is always willing to undertake it with enthusiasm and vigor, making her positive attitude one of her most endearing qualities. Once she has committed herself to completing a task, Katherine is timely, efficient, and the quality of her work is outstanding. One of the major projects assigned to our Environmental Law Fellow each year is the completion of the bench memorandum for judges of Haub Law's annual National Environmental Moot Court Competition. For the first time, I witnessed Katherine's capacity for diligent work, her ability to independently set and meet deadlines, and deliver an excellent product that exceeded our highest expectations. Having read her bench memo in my preparation as a judge in the forthcoming competition, I can confidently attest to the quality and thoroughness of her legal research, writing, and analysis.

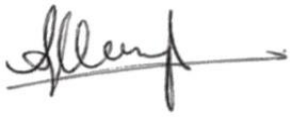
As her supervisor, I am conscious of how much Katherine prides herself on her work and how hard she endeavors to maintain high standards. Having built herself a reputation for careful editing and overall meticulous work, the faculty often seek Katherine's assistance for editing the variety of publications and written materials produced by the environmental law program. Notwithstanding her challenging LLM coursework, Katherine meets challenging deadlines with ease. Among her many responsibilities, she was asked to research and conduct a comprehensive review of national food and agriculture law-related academic programs to assist Pace Law's Food

Law Initiative in its efforts to expand its programming and its reputation among academics across the country. Her work was extremely thorough and detail-oriented and produced several avenues by which the Food Law Initiative could direct its efforts. Whether it is organizing and hosting educational webinars, undertaking programmatic research and data analysis, producing content for Pace Food Law's social media account, or working with teams of students and staff to improve sustainable practices within the law school community, she manages and completes the multiple tasks that we give her, without fault nor complaint. She is an asset to not only our program, but also the greater Haub Law community.

I am fortunate to have the pleasure of working with such a stellar individual, who thrives both at school and in work, while purposefully engaging in and contributing positively to the school community. Katherine is hardworking, highly driven, and intelligent with a gift for legal analysis. I am confident that she will do great things in her future and I feel grateful to have witnessed the beginning of her trajectory of excellence in her legal career. I highly recommend Katherine as a judicial clerk and strongly encourage your favorable consideration to such a qualified applicant.

If you have any further questions, please do not hesitate to contact me.

All the best,



ACHINTHI C. VITHANAGE
ASSOCIATE DIRECTOR OF ENVIRONMENTAL LAW PROGRAMS
ADJUNCT PROFESSOR OF LAW
ELISABETH HAUB SCHOOL OF LAW
PACE UNIVERSITY

New York State
ACADEMY OF TRIAL LAWYERS

Dear Judge,

It is my pleasure to strongly recommend Katherine Horner for this post-graduate judicial clerkship.

I am the Executive Director of the New York State Academy of Trial Lawyers bar association. For almost three years, Katherine Horner has been employed as the Academy's Operations Coordinator. Though many young professionals have filled this position over the years, Katherine has distinguished herself as an exceptional worker and team player.

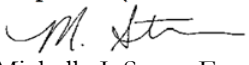
We are a small operation at the Academy, with only myself, the Deputy Director, and Katherine, as Operations Coordinator, administering all of the association's activities. Katherine has been invaluable in not only efficiently completing her individual responsibilities, but also readily volunteering her time and energy to help with other projects when needed. I have noted with admiration her commitment to the team's success, from taking on a colleague's responsibilities during her absence, to working after hours to complete a time-sensitive project. I have also often relied on her to assist me in resolving unexpected tech- and business-related problems. Her strong attention to detail and analytical skills have made her a proficient editor. She often is tasked with editing and/or creating educational materials for our Continuing Legal Education presenters. These legal practitioners trust her to assist with such tasks as verifying their case citations and translating their lectures into eye-catching and accurate visual aids.

Katherine is not only a hard worker; she is also a genuine joy to be around. Her warmth and positivity are infectious. She employs the same degree of care and consideration to her office duties as to her colleagues' personal wellbeing. We often call her our "office therapist," because of her ability to listen and empathize. As part of her work responsibilities, Katherine runs the CLE seminars in Albany and Manhattan. Her interpersonal skills have allowed her to excel in this capacity, by making attendees and presenters feel welcome and supported.

The COVID-19 crisis forced us to quickly evolve in the face of a suddenly remote reality. Katherine has adapted to these changes with ease. She has played an integral part in assisting with the creation of all new virtual CLE courses and compiling online resources concerning COVID developments for the legal community. As the main point of contact at the Academy, Katherine has efficiently managed the daily needs of our more than 3,100 members.

With her close attention to detail, strong work ethic, and positive attitude, I am absolutely confident that Katherine would be an invaluable asset as a clerk in your chambers. If you need more information, please do not hesitate to contact me at [cell phone?], or by email at mstern@trialacademy.org. I would be happy to further elaborate on my time as her supervisor.

Respectfully,



Michelle J. Stern, Esq.
Executive Director
New York State Academy of Trial Lawyers

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WRITING SAMPLE

The attached writing sample is a Memorandum written for my 2021 Spring Semester course: "Fundamentals of Legal Drafting: Litigation." For the assignment, I acted as the attorney for the Defendant Professional Rodeo Cowboys Association (PRCA) and was tasked with drafting a Memorandum in opposition to Plaintiffs' application for a preliminary injunction against PRCA's newly enacted Bylaws. The Plaintiffs were three of PRCA's members who sought to create a new competing rodeo association – Elite Rodeo Association (ERA) – while continuing to participate in PRCA-sanctioned rodeos.

For purposes of this writing sample, I have omitted the following sections of my brief: Preliminary Statement; Statement of Facts; and Conclusion. I have also omitted the following from my Argument section: "Section I(a): Plaintiffs' Section 1 Claim Fails Because They Cannot Prove The Bylaws Are The Result Of The Type Of Concerted Action Required For A Conspiracy"; "Section II: Plaintiffs Cannot Prove That They Are Irreparably Harmed"; "Section III: Plaintiffs Cannot Show That The Harm They Will Face If An Injunction Is Denied Outweighs The Harm Imposed On PRCA If It Is Granted"; and "Section IV: Plaintiffs Cannot Show That A Preliminary Injunction Is In The Public Interest."

This selection is entirely my own work and has not been edited by third parties.

ARGUMENT

I. Plaintiffs Cannot Prove That They Are Likely To Succeed On Their Antitrust Claims

b. Plaintiffs' Section 2 Claim Fails Because the PRCA Does Not Have Monopoly Power

Andrew Dick, economist and expert witness for PRCA, reminds this Court that in economics "there is no such thing as a free lunch." App. 33 (Dick Decl.). And yet this appears to be Plaintiffs' requested relief: To cultivate a new organization in the professional rodeo marketplace—boasting "top-tier competition"—while continuing to profit from a competitor's success in the industry. App. 52 (Mote Decl.). Contrary to Plaintiffs' contention, however, "a company . . . has no general duty to cooperate with its business rivals." *Morris Communs. Corp.*, 364 F.3d at 1295. To show a violation of Section 2 of the Sherman Act, a business practice must "harm the competitive process"; "[h]arm to one or more competitors will not suffice." *Id*. at 1295.

Monopoly power in violation of Section 2 of the Sherman Act requires a showing of "possession of monopoly power in the relevant market" and "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). While demonstrating that a business holds a large market share in the relevant market may evince monopoly power, it is not determinative and generally requires control of 75% or more of the market. *See id*. at 571 (citing market share percentages sufficient for the Court to infer a "predominant share of the market": "over 80%" in *American Tobacco Co. v. United States*; "90% of the market" in *United States v. Aluminum Co. of America*; and "87% of the accredited central station service business" in *United States v. Grinnell Corp.*). Conspicuously absent from Plaintiffs' argument is any attempt at estimating the percentage of

PRCA's share of the market. Instead, Plaintiffs argue that PRCA's superior business acumen is sufficient to find it guilty of illegal monopolization of the marketplace. Unfortunately for Plaintiffs, this is not enough.

Illegal monopolization requires that a business "exercise its power to control prices or exclude competitors from the relevant market for its products." *Abraham & Veneklasen*, 776 F.3d at 334; *see also* (Dick-32) ("A large market share does not give a firm the ability to control market output and affect price unless the firm can prevent or seriously impede entry and expansion by rivals."). In making this determination, courts first identify the relevant market and then examine whether the business engages in anticompetitive conduct, the result of which is to "control prices or exclude competition." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). However, in keeping to the strictures of the Sherman Act, courts reiterate that it is not "vigorous" competition creating commercial success that violates the Act, but, rather, conduct that "harm[s] the competitive process and thereby harm[s] consumers." *Copperweld Corp.*, 467 U.S. at 767; *Morris Communs. Corp.*, 364 F.3d at 1295 ("Unlawful monopoly power requires anticompetitive conduct, which is 'conduct without a legitimate business purpose that makes sense only because it eliminates competition.'"); *see also E. I. Du Pont*, 351 U.S. at 391 ("Senator Hoar, in discussing § 2, pointed out that monopoly involved something more than extraordinary commercial success, 'that it involved something like the use of means which made it impossible for other persons to engage in fair competition.'").

The boundaries of the relevant market in a Section 2 inquiry "rests on a determination of available substitutes" to the service in question. *Rothery Storage & Van Co.*, 792 F.2d at 218; *see also E. I. Du Pont*, 351 U.S. at 395 ("In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities

reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal."). Defining available substitutes in the market requires analyzing both the degree to which another "product will be substituted for the product in question"—"cross-elasticity of demand"—and the degree to which "other production facilities" will be "converted to produce a substitutable product"—"cross-elasticity of supply." *Rothery Storage & Van Co.*, 792 F.2d at 218; *see also E. I. Du Pont*, 351 U.S. at 404 ("The 'market' which one must study to determine when a producer has monopoly power . . . is composed of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered.").

The Plaintiffs define the relevant market at issue in the case as being "the market for professional rodeo athletes." Page 18. PRCA does not dispute this conclusion. Yet, Plaintiffs then proceed to narrow the playing field by only comparing PRCA to "other national rodeo sanctioning bod[ies]." Page 19. This is an incomplete analysis. Substitutes for PRCA's "product"—rodeo tours for professional rodeo athletes—and substitutes for PRCA as a "facility" that produces such tours, encompass all multi-event and single-event rodeos—those sanctioned by organizations like PRCA as well as open rodeos—because professional rodeo athletes participate in both. *See* App. 34-36; ¶ 26-27 (Defendants' Decls.) (discussing the success of "The American, a single day independent rodeo event . . . [that has] no affiliation with the PRCA" and which "attract[s] top cowboy contestants, including [Plaintiff] Trevor Brazile").

After identifying the relevant market, courts then examine whether the business has engaged in unlawful exclusionary conduct. In his comprehensive discussion of illegal monopolization, PRCA's expert economist, Andrew Dick, provides clear evidence that PRCA

does not impermissibly exclude competitors from the marketplace and thus does not hold illegal monopoly power:

- First, there is "freedom of competition" in the marketplace, which belies PRCA's monopoly power, because professional rodeo athletes can earn substantial compensation in non-PRCA sanctioned and open rodeos. *See* App. 34-36 (Dick Decl.) (noting that "PBR . . . awards more prize money to top bull riders than the PRCA awards to top contestants"; "top finishers" in IPRA and UPRA—the two other national rodeo sanctioning bodies besides PRCA—"received prize money that would rank them *among the top PRCA finishers*"; and that open rodeos like Rodeo Houston and The American also award substantial prizes amounting to more than $2 million dollars in 2012 and 2015 respectively).

- Second, there is no indication that PRCA restricts horizontal competition, which is another indicator of monopoly power, because PRCA allows athletes to choose—"right up until performance time"—which rodeos they wish to participate in, whether they be PRCA or non-PRCA sanctioned rodeos. App. 38 (Dick Decl.).

- Third, there are "no economically meaningful barriers to entry or expansion" for non-PRCA rodeos, as can be seen by the number of professional rodeo venues successfully entering the marketplace and attracting large numbers of professional rodeo athletes. App. 40-41 (Dick Decl.) (noting that "PBR bore similar types of entry costs as the PRCA, including organizing its own annual tournament and qualification system," and yet "has grown into a successful sanctioning body," and also noting the success of "The American" in holding its "half-million dollar American Semi-Finals[,] . . . where nearly 600 athletes from around the world" competed, only three years following its launch).

In attempting to prove that PRCA's Bylaws amount to unlawful exclusionary conduct, Plaintiffs berate the Bylaws as a "bar" against and "blacklist" of all ERA rodeo athletes. Page 21. By doing so, however, Plaintiffs misrepresent the Bylaws' purpose, which is not to ban all ERA rodeo athletes from PRCA, but rather to modify its membership criteria to protect against conflicts of interest that may harm its members and its economic sustainability. As the Supreme Court made clear in *Northwest Wholesale Stationers*, membership associations "must establish and enforce reasonable rules in order to function effectively." 472 U.S. at 296.

The Bylaws do not exclude competition in violation of Section 2 because they do "not force a new sanctioning association to bear costs dissimilar to those borne by the PRCA" and, by

doing so, impermissibly restrict entry into the market. App. 43-47 (Dick Decl.). Rather, the "multiplicity of competitors and [their] financial strength" disprove Plaintiffs' claim that PRCA has an illegal monopolization of the professional rodeo market. *E. I. Du Pont*, 351 U.S. at 403.

c. **Assuming Arguendo That The Bylaws Present Concerted Action, Plaintiffs' Claims Still Fail Because The Bylaws Are Procompetitive**

Courts have emphasized that when there is a legitimate business justification for the challenged restraint on competition, there is no violation of the Sherman Act. *See Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 117 (1984) ("It is reasonable to assume that most of the regulatory controls of the [association] are justifiable means of fostering competition among [athletes] and therefore procompetitive . . . ."); *Morris Communs. Corp.*, 364 F.3d at 1295 ("[R]efusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition."). PRCA enacted the Bylaws as a means of preventing free riding by members who would satisfy their own pecuniary benefit at the expense of the membership as a whole. *See* App. 10 (Stressman Decl.). (explaining that the Bylaws were a response to the Board's fears "that ERA's athletes would attempt to use their membership in PRCA to subsidize and promote their own, for-profit venture"); App. 49 (Dick Decl.) ("Membership associations may adopt rules and practices intended to discourage free riding by more closely aligning the interests of individual members so as to encourage each of them to *devote best efforts* and *pull collectively* to maximize joint output.") (emphasis included). In cases like this, where a court is presented with regulations restricting free riding, courts have held that free riding is a sufficient justification to hold that an entity's restraint on competition was permissible under the Sherman Act. *N. Am. Soccer League*, 883 F.3d at 43 ("Eliminating free riders can be a procompetitive advantage of alleged restraints on competition . . . ."); *Rothery Storage & Van Co.*, 792 F.2d at 223 (holding that the

association's agreements are "a classic attempt to counter the perceived menace that free riding poses" and thus "enhance[s] consumer welfare by creating efficiency.").

The Sherman Act does not proscribe all restraints on competition, but, rather, only those that are "unreasonably restrictive on competitive conditions." *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 690 (1978); *see also Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 98 (noting that, as all contracts restrain trade, "the Sherman Act was intended to prohibit only unreasonable restraints of trade"). The reasonableness of a challenged restraint on competition is analyzed under one of two frameworks: the *per se* rule or the rule of reason. The *per se* rule creates a framework of analysis in which the "restraint is presumed unreasonable without inquiry into the particular market context in which it is found." *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100. As such, courts have been loath to expand the scope of the rule beyond those "small set of acts regarded . . . as sufficiently dangerous, and so clearly without redeeming value, that they are condemned out of hand." *Eastern Food Servs. Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 4 (1st Cir. 2004). These categories are for the most part constrained to "'naked' price fixing, output restriction, or division of customers or territories." *Id*.

Plaintiffs point to an additional category of conduct for which courts have been cautious to apply the *per se* rule: group boycotts. Given the fact that "lots of arrangements that might literally be described as agreements not to deal are not per se unlawful," the only group boycotts that courts consider *per se* unlawful are those applying "horizontal" restraints, or those "agreements between competitors." *Eastern Food Servs.*, 357 F.3d at 4-5; *see also Am. Steel Erectors, Inc. v. Local Union No. 7, In'l Ass'n of Bridge*, 815 F.3d 43, 62 (1st Cir. 2016) (holding that "the 'rhetoric of older group boycott cases' cannot be 'taken at face value,' and that . . . 'precedent limits the per se rule in the boycott context to cases involving horizontal agreements

among direct competitors.'"). But contrary to Plaintiffs claim, PRCA's Bylaws are not horizontal restraints—"agreements between competitors at the same level of market structure"—but, rather, they are vertical restraints—agreements between "combinations of persons at different levels of market structure such as manufacturers and distributors." *Id*. Plaintiffs' argument conceives the Bylaws as a restraint on competition between PRCA and other rodeo associations, like ERA. This is incorrect. In fact, the Bylaws restrain PRCA *members*, which comprise one level of the "vertical chain" of the professional rodeo tour market, from joining the PRCA association, which exists at a higher level of this "vertical chain." *Id*. PRCA does not compete with its members; on the contrary, its members, including athletes, vendors, and sponsors, work *with* the association to organize the rodeo tours.

Plaintiffs heavy reliance on *Medlin v. Prof. Rodeo Cowboys Ass'n* as proof that the Bylaws represent a horizontal restraint is misplaced. The Defendant may be the same in *Medlin*, but that is where the similarities end. In *Medlin*, the rules at issue prohibited a professional rodeo athlete from competing in PRCA's National Rodeo Finals Rodeo if she had competed in any rodeos not sanctioned by the PRCA. No. 91-N-2082, 1991 U.S. Dist. LEXIS 20847, at *2 (D. Colo. 1991). The challenged rule in *Medlin* restrained competition at the NFR by banning those athletes who also competed at non-PRCA sanctioned rodeos, and it restrained competition at non-PRCA rodeo tours, because it culled from the market's pool of contestants all athletes wishing to qualify for the NFR. *Id*. In other words, the restraint lessened competition across a horizontal level of the marketplace; specifically, the market of competing professional rodeo association tours. Quite different is the case presented to the Court today. The Bylaws challenged by Plaintiffs restrict professional rodeo athletes' ability to become a PRCA member. The

relationship at issue here is that of the PRCA as a rodeo association and professional rodeo athletes as potential PRCA members.

What's more, there was no "single set of consistent pro-competitive effects" presented to the *Medlin* court so as to justify the competitive restraint. *Medlin*, 1991 U.S. Dist. LEXIS 20847, at *6. Here, PRCA has satisfied this burden. As will be discussed, the Bylaws were justified in light of the intention of ERA members to "use their membership . . . to subsidize and promote their own" competing venture and free ride on PRCA's investments. App. 10; ¶ 52 (Defendants' Decls.). Courts have consistently found the threat of free riding to be a legitimate justification for an association's regulations that restrict competition. *See Morris Communs. Corp.*, 364 F.3d at 1298 (finding that "[t]he prevention of free-riding, which is an inherently economic motivation, provides a valid business justification" for restricting competitors' free access to PGA's compiled real-time golf scores); *Rothery Storage & Van Co.*, 792 F.2d at 213, 223 (holding that the association's decision to "terminate the agency contract of any affiliated company that persisted in [providing] interstate carriage [services] on its own account as well as for [the association]" was "a classic attempt to counter the perceived menace that free riding poses").

Even if the regulations at issue were horizontal restraints, this Court would still employ the rule of reason, instead of the *per se* rule, for two reasons: First, the "inflexibility of the rule" has provoked some courts into refusing to apply the *per se* rule in *all* cases of group boycotts, regardless of whether the restraint is horizontal or vertical. *Rothery Storage & Van Co.*, 792 F.2d at 215 (holding that, as "'all agreements to deal on specified terms mean refusal to deal on other terms,' and the literal application of per se illegality to any situation involving a concerted refusal to deal would mean in practical effect 'that every restraint is illegal[,]' 'any comprehensible per se rule for [group] boycotts . . . is out of the question.'"). Second, in the

context of cases involving league sports, courts have recognized that application of the *per se* rule is inapposite as such cases "involve an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 101, 103 (holding that "[the sports association] and its member institutions market . . . competition itself," and, "[t]hus, despite the fact that this case involves restraints on the ability of member institutions to compete . . . , a fair evaluation of their competitive character requires consideration of the [association's] justifications for the restraints"); *see also N. Am. Soccer League*, 883 F.3d at 41 ("Regulation of league sports is a textbook example of when the rule of reason applies."); *cf. Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1153 (5th Cir. 1977) (affirming that "regulations by non-profit organizations to further the purposes of those organizations have been viewed for reasonableness, rather than under the *per se* tests").

In analyzing a challenged restraint on competition, courts look to "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Nat'l Soc. of Prof. Engineers*, 435 U.S. at 691. After a Plaintiff presents evidence that a restraint may have an "actual adverse effect on competition as a whole in the relevant market," the Defendant may then rebut the challenge by presenting a procompetitive justification for the restraint. *N. Am. Soccer League*, 883 F.3d at 42. PRCA denies Plaintiffs' claim that its Bylaws have an adverse effect "on competition as a whole." *Id*. Regardless, PRCA's justification for the Bylaws—that it prevents against free riding—is sufficient to save it from suppression under the Sherman Act.

"A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them." *Rothery Storage & Van Co.*, 792 F.2d at 212. In joint ventures, like PRCA, the free ride can become a

palpable problem when the delicate balance between parties destabilizes allowing one side to reap rewards from the other's effort without reciprocating in kind. *Id*. at 212-13. In such circumstances, courts recognize the "significant procompetitive advantages" that come from "standard-setting organizations" generating new standards that "[e]liminat[e] free riders." *N. Am. Soccer League*, 883 F.3d at 43. For instance, in *Rothery Storage & Van Co.*, Defendant, a nationwide moving company that contracted with independent carriers, discovered these carriers were starting their own moving companies by using Atlas' supplies and services to attract business. 792 F.2d at 212-13. In response, Atlas instituted new regulations that required its agents to sever their own competing accounts from that of Atlas or risk termination of their contracts. *Id*. at 213. The court upheld this regulation as a reasonable response to the perceived threat of free riding and agreed that it was justified in order to prevent the continued exploitation of Atlas' resources:

> [I]f Atlas provides superior training to [its] employees . . . , that training improves the quality of work not only on shipments undertaken for Atlas but also on shipments made on the carrier agent's own interstate authority. And because carrier agents may elect to use their own or Atlas' interstate authority for a given shipment exposure to national clients at Atlas' sales meetings can provide them with interstate customers for their own . . . accounts. . . . If the carrier agents could persist in competing with Atlas while deriving the advantages of their Atlas affiliation, Atlas might well have found it desirable, or even essential, to decrease or abandon many such services.

Id. at 223.

Dubbed "intangible advantages," the court considered this list of services particularly beneficial to free riders in light of the fact that customers and sponsors could not "eas[ily] segregate[e]" between those services generated by Atlas and those by its agents. *Id*. at 222. One can clearly see parallels between this case and the advantages members attain through association with PRCA. PRCA trains judges, "bears the cost of organizing and scheduling

cowboy entries and processing rodeo payouts," and "sets standards and monitors the quality of its stock contractors," all of which improves the quality of its rodeos and makes it easier for athletes to compete. App. 51-52 (Dick Decl.). PRCA also publishes *ProRodeo Sports News*, "the definitive information source for the . . . avid fan," and pays for CBS News to broadcast its National Finals Rodeo and Champions Challenge to millions of homes nationwide, all of which increases contestants' public exposure. App. 51-52 (Dick Decl.).

These expenditures take not only significant amounts of time and energy, but also money. As economists put it so succinctly: "[T]here is no such thing as a free lunch." App. 33 (Dick Decl.). Yet Plaintiffs' plan to "co-exist" with PRCA would allow them to feast from its plate. App. 9; ¶ 41; ¶ 60 (Plaintiffs' Decls.):

- Plaintiffs' plan to continue to compete and earn financial awards from winning in PRCA's sanctioned rodeos would financially subsidize the significant costs of launching a new competing rodeo association. App. 53 (Dick Decl.); *see* App. 41 (Bazile Decl.) ("It is important for me to be able to continue to compete in PRCA-sanctioned rodeos, . . . because ERA is still a new organization that is launching a new product in rodeo."); (Mote-53) ("[W]e are taking a risk with ERA . . . [so c]ontinuing to compete in certain PRCA-sanctioned rodeos while we launch ERA will allow me to continue to make a living . . . ."); *and* App. 60-61 (Motes Decl.) ("I need to continue being a PRCA member so that I can . . . earn a living . . . and supplement [ERA's] rodeos with PRCA rodeos that fit my schedule.").

- Plaintiffs' plan to structure its Qualification System to allow athletes to earn points "by placing at any rodeo they choose that fits" certain criteria—criteria that encompasses all of PRCA-sanctioned rodeos—would allow ERA to "free ride on PRCA events for its qualifying system." App. 54 (Dick Decl.); App. 25 (ERA website). This Qualification System would differ from other rodeo associations, including the Professional Bull Riders ("PBR"), that instead designed and incurred the cost of setting up their own qualifying events. *See* App. 26 (Bernard Decl.) (discussing how PBR "organized its own series of events . . . and created its own qualifying tournament" and how, similarly, The American designed its own qualification system using "qualifying events that The American has set up").

- Finally, Plaintiffs' plan would allow them to free ride on PRCA's investments by continuing to compete in PRCA-sanctioned events and, by doing so, "increase[their] fan base"; maintain "strong ties to and relationships with the rodeo committees"; and "drive traffic to ERA's favored mobile application[, "Rodeo Results App," to] increase ERA's

> exposure." App. 13 (Stressman Decl.); App. 41; ¶ 52 (Plaintiffs' Decls.) (noting how ERA's schedule will allow him to participate in PRCA-sanctioned rodeos where he will "continue to develop [his] fan base and sponsorship opportunities").

Free riding in this context would not only decrease PRCA's efficiency as an association, it would "create[] a conflict of interest within the PRCA membership between the 'rank and file' and the ERA investor subgroup." App. 64; ¶ 17 (Defendants' Decls.) (arguing that it is "fundamentally unfair" for Plaintiffs to "creat[e] a competing organization that will drive the money in the industry to certain anointed 'stars' (i.e., themselves), while . . . also cherry-picking which PRCA events to participate in and benefit from more rest and relaxation between events"); App. 13 (Stressman Decl.) (explaining PRCA's decision to enact the Bylaws based partly on PRCA members' "extreme discomfort with ERA owners and employees taking prize money out of PRCA contestants' pockets to help fund a competing organization"). The Bylaws were a reasonable reaction to the risk of free riding inherent in Plaintiffs' plan.

Applicant Details

First Name	**Matthew**
Last Name	**Hughes**
Citizenship Status	**U. S. Citizen**
Email Address	**mhughes29@liberty.edu**
Address	**Address** **Street** **19 Pinehurst Green Way** **City** **Greenville** **State/Territory** **South Carolina** **Zip** **29609** **Country** **United States**
Contact Phone Number	**8649015693**

Applicant Education

BA/BS From	**Bob Jones University**
Date of BA/BS	**May 2016**
JD/LLB From	**Liberty University School of Law** **http://law.liberty.edu/**
Date of JD/LLB	**May 11, 2021**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Liberty University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**NAAC Moot Court Competition - ABA (2020) - D.C. Regional Co-Champions** **Leroy R. Hassell, Sr. National Constitutional Law Moot Court Tournament (2019)** **NAAC Moot Court Competition - ABA (2021) - competitor**

Bar Admission

Admission(s) **South Carolina**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

References

Jeffrey C. Kull, Esq.
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Judge Paul Spinden
Liberty University School of Law
Lynchburg, VA
pspinden@liberty.edu
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MATTHEW A. HUGHES

19 Pinehurst Green Way | Greenville, SC 29609
(864) 901-5693 | mhughes29@liberty.edu

EDUCATION

Liberty University School of Law, Lynchburg, VA 2021
J.D., GPA: 3.82; Class rank: 1/64
Honors: Student Development Editor, Law Review
Evidentiary Issues in Federal Habeas Corpus Petitions (Spring 2020)
A New Argument for the Next Kahler v. Kansas (Fall 2020)
Vice-Chair, Moot Court Board
Associate Member, Alternative Dispute Resolution Board
Co-Champions and 7th Best Oralist, NAAC Moot Court Competition, D.C. Regional (Feb. 2020)
Quarterfinalist, Best American Advocate, and Best American Teamwork, Transatlantic Negotiation Competition (March 2021)
9th Place, ABA Mid-Atlantic Regional Negotiation Competition (Nov. 2019)
Blackstone Legal Fellowship (Summer 2019)

Bob Jones University, Greenville, SC 2018
M.A., Communication Studies, GPA: 4.00
Honors: First to receive Pass with Distinction on all Comprehensive Exams
Activities: Elected by my peers to lead a communication audit of a geographically dispersed company

Bob Jones University, Greenville, SC 2016
B.A., History, GPA: 4.00, *summa cum laude*
Honors: Leila R. Custard Memorial Award for Historical Research (best capstone paper)
Who's Who in American Universities & Colleges
Activities: William Jennings Bryan Literary Society: President, Vice-President, Secretary, softball coach, and Scholastic Bowl team captain

PROFESSIONAL EXPERIENCE

Judicial Law Clerk, Front Royal, VA AUGUST 2021 – AUGUST 2022
Chambers of Judge Clifford Athey, Jr., Virginia Court of Appeals
Will serve as Judicial Law Clerk to Judge Clifford Athey, Jr., writing bench memoranda and drafting opinions.

Murphy & Grantland, P.A., Columbia, SC MAY – JULY 2020
Summer Law Clerk
Attended depositions and worked closely with partners and associates by drafting research memoranda on areas of the law and on specific matters. Drafted a demand letter and a motion for summary judgment with supporting memorandum of law. Kept on by a shareholder to work remotely during July and August in light of excellent work.

Judicial Externship, Medina, OH JUNE – JULY 2019
Chambers of Judge Alice Batchelder, Court of Appeals for the Sixth Circuit
Attended oral argument, prepared an internal memorandum on federal habeas corpus law, wrote a bench memo on a death penalty habeas corpus case, proofread opinions, and conducted research.

INTERESTS

History (presented papers at the 2017 and 2019 meetings of the South Carolina Historical Association), music (high school and college orchestras), baseball and softball umpire (2014-16).

L28788294 Matthew Hughes
Jun 01, 2021 04:15 pm

Academic Transcript

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Name : Matthew Hughes
Birth Date: May 23, 1994

Curriculum Information

Current Program
Juris Doctor
Major and Department: Juris Doctorate, School of Law

***Transcript type:WEB LU Unofficial Web Transcript is NOT Official ***

DEGREE AWARDED

Seeking Degree: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree
Major: Juris Doctorate

INSTITUTION CREDIT -Top-

Term: Fall 2018
Academic Standing:

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	501	JD	Foundations of Law I	A	2.000	8.00		
LAW	505	JD	Contracts I	A	3.000	12.00		
LAW	511	JD	Torts I	A	3.000	12.00		
LAW	515	JD	Property I	A	2.000	8.00		
LAW	521	JD	Civil Procedure I	A-	3.000	11.01		
LAW	525	JD	Lawyering Skills I	A-	2.000	7.34		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	58.35	3.89
Cumulative:	15.000	15.000	15.000	15.000	58.35	3.89

Unofficial Transcript

Term: Spring 2019
Academic Standing: Good Standing

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	502	JD	Foundations of Law II	A	2.000	8.00		
LAW	506	JD	Contracts II	A	3.000	12.00		
LAW	512	JD	Torts II	A	2.000	8.00		
LAW	516	JD	Property II	A-	3.000	11.01		
LAW	522	JD	Civil Procedure II	A	2.000	8.00		
LAW	526	JD	Lawyering Skills II	A	2.000	8.00		
LAW	526	JD	Lawyering Skills II	A	1.000	4.00		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	59.01	3.93
Cumulative:	30.000	30.000	30.000	30.000	117.36	3.91

Unofficial Transcript

Term: Summer 2019
Academic Standing:

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	863	JD	Judicial Clerkship Externship	P	2.000	0.00		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	0.000	0.00	0.00
Cumulative:	32.000	32.000	32.000	30.000	117.36	3.91

Unofficial Transcript

Term: Fall 2019

Academic Standing:

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	531	JD	Constitutional Law I	A-	3.000	11.01		
LAW	535	JD	Criminal Law	B+	3.000	9.99		
LAW	561	JD	Business Associations	A	4.000	16.00		
LAW	571	JD	Lawyering Skills III	B+	2.000	6.66		
LAW	831	JD	Appellate Advocacy	B+	2.000	6.66		
LAW	832	JD	Advanced Appellate Advocacy	P	1.000	0.00		
LAW	881	JD	Law Review Candidacy	P	1.000	0.00		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	14.000	50.32	3.59
Cumulative:	48.000	48.000	48.000	44.000	167.68	3.81

Unofficial Transcript

Term: Spring 2020

Academic Standing: Good Standing

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	532	JD	Constitutional Law II	P	3.000	0.00		
LAW	541	JD	Criminal Procedure	P	3.000	0.00		
LAW	545	JD	Evidence	P	3.000	0.00		
LAW	565	JD	Professional Responsibility	P	2.000	0.00		
LAW	572	JD	Lawyering Skills IV	P	2.000	0.00		
LAW	832	JD	Advanced Appellate Advocacy	P	1.000	0.00		
LAW	882	JD	Law Review Junior Staff	P	1.000	0.00		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	0.000	0.00	0.00
Cumulative:	63.000	63.000	63.000	44.000	167.68	3.81

Unofficial Transcript

Term: Fall 2020

Academic Standing:

Subject	Course Level		Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	575	JD	Wills, Trusts, and Estates	A	3.000	12.00		

LAW	591	JD	Taxation of Individuals	B+	3.000	9.99
LAW	595	JD	Law Skills V - Trial Advocacy	A	3.000	12.00
LAW	637	JD	Basic Uniform Commercial Code	A-	3.000	11.01
LAW	851	JD	Constitutional Litigation Clin	P	2.000	0.00
LAW	885	JD	Law Review Editorial Board I	P	2.000	0.00

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	12.000	45.00	3.75
Cumulative:	79.000	79.000	79.000	56.000	212.68	3.79

Unofficial Transcript

Term: Spring 2021

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	580	JD	Statutory Interpretation	AU	1.000	0.00		
LAW	711	JD	Federal Jurisdiction	A	3.000	12.00		
LAW	825	JD	Advanced Trial Advocacy	A	3.000	12.00		
LAW	832	JD	Advanced Appellate Advocacy	P	1.000	0.00		
LAW	886	JD	Law Review Editorial Board II	P	2.000	0.00		
LAW	901	JD	Advanced Bar Studies	A	3.000	12.00		

Term Totals (Law School)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	9.000	36.00	4.00
Cumulative:	91.000	91.000	91.000	65.000	248.68	3.82

Unofficial Transcript

TRANSCRIPT TOTALS (LAW SCHOOL) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	91.000	91.000	91.000	65.000	248.68	3.82
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	91.000	91.000	91.000	65.000	248.68	3.82

Unofficial Transcript

RELEASE: 8.7.1

NAME/ADDRESS/STUDENT ID NUMBER	HS ATTENDED/DATE OF GRAD	DATE FIRST ADMITTED
Hughes / Matthew Aaron 157239 19 Pinehurst Green Way Greenville, SC 29609 XXX-XX-2055	Academy Of Home Education Greenville, SC 29614 June 2012	August 31, 2016

MAJOR/MINOR UNDERGRADUATE

MAJOR: History
MINOR: No Minor

DATE OF BIRTH/CITIZENSHIP

Born: 05/23/1994
Citizenship: UNITED STATES

GRADUATE DEGREE PROGRAM

MA Communication Studies

12/04/2018

LEARN. LOVE. LEAD.
BOB JONES UNIVERSITY
1700 Wade Hampton Blvd. • Greenville, SC 29614
(864) 242-5100 • Fax: (864) 235-6661 • www.bju.edu

THRU 01/2019

Bob Jones University
Conferred Bachelor Of Arts Degree
History
05/06/2016

Approved for the School of Fine Arts and Communication
Division of Graduate Studies 12/18/2015

COURSE NUMBER/TITLE		HRS ATTPD	GRADE	CREDITS EARNED	QUALITY POINTS
First Semester 2016-2017					
Com 507	Conflict Management	3	A	3	12
Com 600	Introduction to Graduate Studies	3	A	3	12
Com 602	Quantitative Research Methods	3	A	3	12
	Semester: GPA 4.00	9		9	36
	Cumulative: GPA 4.00	9		9	36
Second Semester 2016-2017					
Com 603	Adv Organizational Communication	3	A	3	12
Com 604	Qualitative Research Methods	3	A-	3	12
Com 607	Leadership & Communication	3	A	3	12
	Semester: GPA 4.00	9		9	36
	Cumulative: GPA 4.00	18		18	72
First Semester 2017-2018					
SHM 634	Expository Sermon Preparation	2	A	2	8
Com 525	Special Topics: Strategic Narrative	3	A	3	12
Com 622	Assess Methods in Communication	3	A-	3	12
	Semester: GPA 4.00	8		8	32
	Cumulative: GPA 4.00	26		26	104
Second Semester 2017-2018					
Com 505	Communication Training & Development	3	A	3	12
Com 665	Mgmt Effectiveness & Communication	3	A	3	12
	Semester: GPA 4.00	6		6	24
	Cumulative: GPA 4.00	32		32	128

MA Communication Comprehensive Exam Passed 03/03/2018

CONFERRED MASTER OF ARTS DEGREE
Communication Studies
05/04/2018
For work completed at Bob Jones University
Grade Point Average 4.00 on 4.00 scale
*** END OF RECORD ***

NAME/ADDRESS/STUDENT ID NUMBER	HS ATTENDED/DATE OF GRAD	DATE FIRST ADMITTED
Hughes / Matthew Aaron 157239 19 Pinehurst Green Way Greenville, SC 29609 XXX-XX-2055	Academy Of Home Education Greenville, SC 29614 June 2012	August 31, 2011

MAJOR/MINOR UNDERGRADUATE

MAJOR: History
MINOR: No Minor

DATE OF BIRTH/CITIZENSHIP

Born: 05/23/1994
Citizenship: UNITED STATES

GRADUATE DEGREE PROGRAM

12/04/2018

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(864) 242-5100 • Fax: (864) 235-6661 • www.bju.edu

THRU 01/2019

First Semester 2011-2012

COURSE NUMBER/TITLE		HRS ATTPD	GRADE	CREDITS EARNED	QUALITY POINTS
Hi 101	History of Civilization	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	3		3	12

TFR: The College Board--CLEP Princeton, NJ 08541 07/2012-08/2012

En 103	Analyzing & Interpreting Lit		CR	3	
Ma 103	College Algebra		CR	3	
	Semester:			6	
	Cumulative:	3		9	12

First Semester 2012-2013

Uni 101	Freshman Seminar		P	1	
En 102	Composition & Rhetoric	3	A-	3	12
CpS 105	Computer Fluency	3	A	3	12
CpS 109	Introduction to Computer Programming	3	A	3	12
Bi 105	Old Testament Messages	1	A	1	4
FA 125	Introduction to the Arts	1	A	1	4
Mu 225	Appreciation of Music	2	A	2	8
Vi 211	Violin Instruction for the Non-Major	1	A	1	4
Com 101	Fundamentals of Speech	3	A-	3	12
	Semester: GPA 4.00	17		18	68
	Cumulative: GPA 4.00	20		27	80

Second Semester 2012-2013

En 205	American Literature 1607-1865	3	A	3	12
Ph 200	Themes in Western Thought	3	A	3	12
Sc 200	Essential Science	3	A	3	12
Hi 102	History of Civilization since 1650	3	A	3	12
SSE 200	Foundations of Economics	3	A	3	12
Bi 109	New Testament Messages	1	A	1	4
Bi 220	The Life & Ministry of Christ	1	A	1	4
CC 001	Music Ensemble		CR	1	
Vi 221	Violin Instruction for the Non-Major	1	A	1	4
	Semester: GPA 4.00	18		19	72
	Cumulative: GPA 4.00	38		46	152

Summer 2013

Hi 201	United States History 1492 to 1877	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	41		49	164

First Semester 2013-2014

Hi 407	England to 1750	3	A	3	12
Bi 230	Hermeneutics	2	A	2	8
ALG 101	Elementary Greek I	3	A	3	12
NT 455	Old & New Testament Prophecy	2	A	2	8
NT 480	The General Epistles	2	A	2	8
NT 515	Biblical Themes	3	A	3	12
Com 202	Principles of Communication	0	W	0	0
	Semester: GPA 4.00	15		15	60
	Cumulative: GPA 4.00	56		64	224

Second Semester 2013-2014

Ph 402	Ethics	3	A-	3	12
Hi 301	Rome	3	A	3	12
Hi 406	Historiography	3	A	3	12
ALG 102	Elementary Greek II	3	A	3	12
NT 460	The Gospels	2	A	2	8
NT 516	Biblical Themes	3	A	3	12
CC 001	Music Ensemble		CR	2	
	Semester: GPA 4.00	17		19	68
	Cumulative: GPA 4.00	73		83	292

Summer 2014

Hi 202	United States History since 1865	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	76		86	304

First Semester 2014-2015

CpS 201	Information Technology I	3	A	3	12
Hi 330	Colonial Era in America	3	A	3	12
Hi 409	The Middle East	3	A	3	12
Hi 490	Independent Study	3	A	3	12
BG 201	Intermediate Greek I	3	A	3	12
	Semester: GPA 4.00	15		15	60
	Cumulative: GPA 4.00	91		101	364

Second Semester 2014-2015

CpS 335	Computer Network Fundamentals	3	A	3	12
Hi 414	Philosophy of History	3	A	3	12
Bi 499	Apologetics & Worldview	3	A	3	12
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Min 430	Christian Masterworks	2	A	2	8
	Semester: GPA 4.00	17		17	68
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Born: 05/23/1994 Citizenship: UNITED STATES	MAJOR: History MINOR: No Minor	

12/04/2018

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First Semester 2015-2016					
Hi 333	Civil War & Reconstruction	3	A	3	12
Hi 425	America's Ideological Foundations	3	A	3	12
Hm 301	Homiletics I	3	A	3	12
Com 201	Public Speaking	3	A	3	12
Ac 203	Principles of Accounting I	3	A	3	12
	Semester: GPA 4.00	15		15	60
	Cumulative: GPA 4.00	123		133	492

Elected to Membership in Who's Who Among
Students In American Universities and Colleges
2015-16

COURSE NUMBER/TITLE		HRS ATTPD	GRADE	CREDITS EARNED	QUALITY POINTS
Second Semester 2015-2016					
Hi 310	Middle Ages	3	A	3	12
Hi 440	Historical Research & Writing	3	A	3	12
Com 303	Organizational Communication	3	A	3	12
Com 407	Argumentation & Debate	3	A-	3	12
BA 301	Legal Envir & Ethics of Business	3	A	3	12
	Semester: GPA 4.00	15		15	60
	Cumulative: GPA 4.00	138		148	552

CONFERRED BACHELOR OF ARTS DEGREE
05/06/2016

Grade Point Average 4.00 on 4.00 scale
Ranked 1 in class size of 472
SUMMA CUM LAUDE

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A	(4) excellent	I	incomplete	NR	not reported
B	(3) good	W	withdrawn from course	P	(0) passed
C	(2) passing	WF	withdrawn failure	Cr	(0) credit
D	(1) unsatisfactory	Au	(0) audit		
F	(0) failure				

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This record is transmitted at the request of the student. Under provisions of Public Law 93-380, it is unlawful to submit the information on this record to a third party without the student's consent.

(21316) 6/18

NAME/ADDRESS/STUDENT ID NUMBER	HS ATTENDED/DATE OF GRAD	DATE FIRST ADMITTED
Hughes / Matthew Aaron 157239 19 Pinehurst Green Way Greenville, SC 29609 XXX-XX-2055	Academy Of Home Education Greenville, SC 29614 June 2012	August 31, 2016

MAJOR/MINOR UNDERGRADUATE

MAJOR: History
MINOR: No Minor

DATE OF BIRTH/CITIZENSHIP

Born: 05/23/1994
Citizenship: UNITED STATES

GRADUATE DEGREE PROGRAM

MA Communication Studies

12/04/2018

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THRU 01/2019

Bob Jones University
Conferred Bachelor Of Arts Degree
History
05/06/2016

Approved for the School of Fine Arts and Communication
Division of Graduate Studies 12/18/2015

COURSE NUMBER/TITLE		HRS ATTPD	GRADE	CREDITS EARNED	QUALITY POINTS
First Semester 2016-2017					
Com 507	Conflict Management	3	A	3	12
Com 600	Introduction to Graduate Studies	3	A	3	12
Com 602	Quantitative Research Methods	3	A	3	12
	Semester: GPA 4.00	9		9	36
	Cumulative: GPA 4.00	9		9	36
Second Semester 2016-2017					
Com 603	Adv Organizational Communication	3	A	3	12
Com 604	Qualitative Research Methods	3	A-	3	12
Com 607	Leadership & Communication	3	A	3	12
	Semester: GPA 4.00	9		9	36
	Cumulative: GPA 4.00	18		18	72
First Semester 2017-2018					
SHM 634	Expository Sermon Preparation	2	A	2	8
Com 525	Special Topics: Strategic Narrative	3	A	3	12
Com 622	Assess Methods in Communication	3	A-	3	12
	Semester: GPA 4.00	8		8	32
	Cumulative: GPA 4.00	26		26	104
Second Semester 2017-2018					
Com 505	Communication Training & Development	3	A	3	12
Com 665	Mgmt Effectiveness & Communication	3	A	3	12
	Semester: GPA 4.00	6		6	24
	Cumulative: GPA 4.00	32		32	128

MA Communication Comprehensive Exam Passed 03/03/2018

CONFERRED MASTER OF ARTS DEGREE
Communication Studies
05/04/2018
For work completed at Bob Jones University
Grade Point Average 4.00 on 4.00 scale
*** END OF RECORD ***

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First Semester 2011-2012

COURSE NUMBER/TITLE		HRS ATTPD	GRADE	CREDITS EARNED	QUALITY POINTS
Hi 101	History of Civilization	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	3		3	12

TFR: The College Board--CLEP Princeton, NJ 08541 07/2012-08/2012

En 103	Analyzing & Interpreting Lit		CR	3	
Ma 103	College Algebra		CR	3	
	Semester:			6	
	Cumulative:	3		9	12

First Semester 2012-2013

Uni 101	Freshman Seminar		P	1	
En 102	Composition & Rhetoric	3	A-	3	12
CpS 105	Computer Fluency	3	A	3	12
CpS 109	Introduction to Computer Programming	3	A	3	12
Bi 105	Old Testament Messages	1	A	1	4
FA 125	Introduction to the Arts	1	A	1	4
Mu 225	Appreciation of Music	2	A	2	8
Vi 211	Violin Instruction for the Non-Major	1	A	1	4
Com 101	Fundamentals of Speech	3	A-	3	12
	Semester: GPA 4.00	17		18	68
	Cumulative: GPA 4.00	20		27	80

Second Semester 2012-2013

En 205	American Literature 1607-1865	3	A	3	12
Ph 200	Themes in Western Thought	3	A	3	12
Sc 200	Essential Science	3	A	3	12
Hi 102	History of Civilization since 1650	3	A	3	12
SSE 200	Foundations of Economics	3	A	3	12
Bi 109	New Testament Messages	1	A	1	4
Bi 220	The Life & Ministry of Christ	1	A	1	4
CC 001	Music Ensemble		CR	1	
Vi 221	Violin Instruction for the Non-Major	1	A	1	4
	Semester: GPA 4.00	18		19	72
	Cumulative: GPA 4.00	38		46	152

Summer 2013

Hi 201	United States History 1492 to 1877	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	41		49	164

First Semester 2013-2014

Hi 407	England to 1750	3	A	3	12
Bi 230	Hermeneutics	2	A	2	8
ALG 101	Elementary Greek I	3	A	3	12
NT 455	Old & New Testament Prophecy	2	A	2	8
NT 480	The General Epistles	2	A	2	8
NT 515	Biblical Themes	3	A	3	12
Com 202	Principles of Communication	0	W	0	0
	Semester: GPA 4.00	15		15	60
	Cumulative: GPA 4.00	56		64	224

Second Semester 2013-2014

Ph 402	Ethics	3	A-	3	12
Hi 301	Rome	3	A	3	12
Hi 406	Historiography	3	A	3	12
ALG 102	Elementary Greek II	3	A	3	12
NT 460	The Gospels	2	A	2	8
NT 516	Biblical Themes	3	A	3	12
CC 001	Music Ensemble		CR	2	
	Semester: GPA 4.00	17		19	68
	Cumulative: GPA 4.00	73		83	292

Summer 2014

Hi 202	United States History since 1865	3	A	3	12
	Semester: GPA 4.00	3		3	12
	Cumulative: GPA 4.00	76		86	304

First Semester 2014-2015

CpS 201	Information Technology I	3	A	3	12
Hi 330	Colonial Era in America	3	A	3	12
Hi 409	The Middle East	3	A	3	12
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2015-16

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Com 407	Argumentation & Debate	3	A-	3	12
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B	(3) good	W	withdrawn from course	P	(0) passed
C	(2) passing	WF	withdrawn failure	Cr	(0) credit
D	(1) unsatisfactory	Au	(0) audit		
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(21316) 6/18

M & G
MURPHY & GRANTLAND, P.A.

MEMORANDUM

To: Jeff Kull
Murphy & Grantland, P.A.

From: Matthew Hughes

Date: June 1, 2020

Re: ADEA causation element & use of age-related language

Table of Contents

Memorandum

The alleged target of age discrimination must prove that the discrimination was "because of" age. The Supreme Court has interpreted "because of" to require but-for causation. Age-related comments can serve as direct or circumstantial evidence of age discrimination but are not necessarily dispositive and an age-related comment may or may not demonstrate that an adverse employment decision is traceable to a discriminatory motive.

I. What kind of causation does the ADEA require? But-for causation.

The primary command in the Age Discrimination in Employment Act (ADEA) is contained in 29 U.S.C. § 623. The statute prohibits discrimination "because of" the target's age. The Supreme Court of the United States has ruled that the ADEA's "because of" language requires but-for causation. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177, 129 S. Ct. 2343, 2351 (2009) (holding the plaintiff must prove by a preponderance of the evidence that but for the target's age, the employer

would not have made an adverse employment decision). There are no exceptions for "subset[s] of ADEA cases." *Id.*

II. Are comments which refer to a person's age evidence of age discrimination? Not necessarily.

"The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, 120 S. Ct. 2097, 2111 (2000). Age-related comments[1] can be direct or circumstantial evidence of age discrimination.[2] Comments which relate to factors which are distinct from but correlate to age are not necessarily evidence of age discrimination. Comments which expressly mention the target's age can reflect none or only a small part of the motivation behind an adverse employment decision. Some comments seem age-related but are ambiguous.

A. Comments relating to factors which correlate with age

Legitimate factors which correlate with age are "analytically distinct" from age as a factor in employment decisions. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 St. Ct. 1701, 1706–07 (1993). For example, a person's "age and [plan to retire in five years] are analytically distinct" even though they are closely related. *Tighe v. Bae Sys. Tech. Solutions & Servs.*, No. CCB-14-2719, 2016 U.S. Dist. LEXIS 52394, at *16 (D. Md. Apr. 19, 2016). References to the current stage of an employee's career are not necessarily evidence of age discrimination. *Skiba v. Ill. Cent. R.R.*, 884 F.3d 708, 722 (7th Cir. 2018) (noting that the phrases "later career person" and "close to retirement" are not "inevitable euphemism[s] for old age") (citation omitted). A plaintiff will lose summary judgment because of an "inability to connect, even indirectly, [a legitimate factor] with a discriminatory motive." *Testerman v. EDS Tech. Prods. Corp.*, 98 F.3d 297, 302 (7th Cir. 1996).

An experienced candidate over forty years old can be properly rejected as overqualified. *EEOC v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420 (9th Cir. 1995); *Bay v. Times Mirror Magazines, Inc.* 936 F.2d 112, 118 (2d Cir. 1991). When a person complains about a career move, such as taking a lower-paying job, the employer can form an honest belief that the employee does not wish to continue in the position or make a similar move again and may properly base future employment

---

[1] Stray comments are generally insufficient to prove discrimination against a specific person, *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 733 (4th Cir. 2019).

[2] ADEA claims based on circumstantial evidence are subject to the McDonell Douglas Framework, which the Fourth Circuit has explained as follows:

> There are three steps in the McDonnell Douglas framework: (1) the plaintiff must establish a prima facie case of discrimination or retaliation; (2) if the plaintiff presents a prima facie case, then the burden shifts to the defendant to show a legitimate non-discriminatory or non-retaliatory reason for the adverse employment action; and (3) if the defendant shows such a reason, then the burden shifts to the plaintiff to prove that the reason is pretextual.

Sanders v. Tikras Tech. Sols. Corp., 725 F. App'x 228, 229 (4th Cir. 2018).

decisions on that belief. *Foster v. Principal Life Ins.*, 247 F. App'x 836, 840, (7th Cir. 2007). An employer may discharge an employee because the employee's team is changing the nature of its work to a kind which the employer believes that the employee is not qualified for, happy with, or interested in. *Loeb v. Best Buy Co.*, 537 F.3d 867, 870, 872 (8th Cir. 2008).

1. *Skiba v. Illinois Central Railroad Company*

Age-related comments can be used to refer to facts other than age. In *Skiba v. Illinois Central Railroad Company*, the Seventh Circuit held that some age-related comments can serve as legitimate ways of talking about the stage of a person's career and its impact on personnel decisions. 884 F.3d 708. The plaintiff, a newly promoted manager, complained about his abusive supervisor and requested a transfer. *Skiba*, 884 F.3d at 714–15. He was told he must apply for another position in lieu of a lateral transfer; he did so but was rejected for sixty such positions over two years while younger managers appeared to easily obtain the very lateral transfers he had been denied. *Id.* at 15–16. Eventually, the plaintiff's position was eliminated and he was offered a "non-management clerical job." *Id.* at 717. The Human Resources Director helped him apply for other positions at the company, but ultimately concluded that the plaintiff was "a later career person who presented poorly to hiring managers and had a personal view of his skills and abilities which was inconsistent to how others see him" and did not "take[] feedback well." *Id*. at 717 (alterations and internal quotation marks omitted) (quoting an email from the HR Director). The plaintiff also produced evidence that hiring managers who had rejected his applications said that the plaintiff "would not respond well to the need for additional training, that another (younger) applicant would learn a certain job faster than the plaintiff, that the plaintiff was "low energy," and that an applicant other than the plaintiff "was very close to retirement and looked to be using the opportunity to get back to Michigan . . . so he could retire." *Id.* at 720.

Looking at each of these statements, the Seventh Circuit concluded that they were "innocuous when viewed in context." *Id.* The plaintiff's expected antipathy to new training came from his overconfidence and poor interpersonal skills. *Id.* at 720–21. The statement regarding his speed of adjustment was attributable, according to deposition testimony, to the manager's overall assessment of the qualities of both applicants. *Id.* at 721. The "low energy" comment resulted from the plaintiff's monotone and poor conversational skills rather than his age. *Id.* The "close to retirement" comment seemed to involve the applicant's suitability in the long term. *Id.* The court cited Seventh Circuit precedent holding that a court "cannot equate requirement eligibility with age because eligibility for retirement may be based on age, years of service, or a combination of the two." *Id.* (internal quotation marks omitted) (quoting *David v. Bd. of Trs. Of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 229 (7th Cir. 2017).

2. *Loeb v. Best Buy Co.*

An employer may discharge an employee because the employee's team is changing the nature of its work and the employer honestly believes the employee is not qualified for and would not be happy with or interested in the new work. In *Loeb v. Best Buy*, the plaintiff asked to be transferred to the "Barry team," a group focused on developing high-end products for high-end customers and integrating special sales area and salespeople into Best Buy's stores. *Loeb*, 537 F.3d

at 869–70. He joined the team and, at his request, drafted a job description. *Id.* at 870. The team "focused on partnering people, lacked hierarchy, and relied on a very feelings-based management style" that could be described as "new age." *Id.* When Best Buy ratcheted up the project and began implementing the focused sale areas in Best Buys across the nation, the Barry team leaders told the plaintiff to find another position. *Id.* Believing that he was more interested in the "hip" aspects of developing the "Barry" concept then the "nuts and bolts" of massive expansion, his supervisors told him to find another position. *Id.* The Eighth Circuit found the Barry team leader's reason was a "legitimate, nondiscriminatory reason for terminating" the plaintiff and the plaintiff could not prove that this reason was pretextual. *Id.* at 872–74.

3. *Foster v. Principal Life Insurance Company*

When an employee complains about a role or prior career move, the employer can form an honest belief that the employee does not wish to continue the role or repeat the career move. In *Foster v. Principal Life Insurance Company*, the plaintiff's management position was replaced with two similar positions for which she was passed over. *Foster*, 247 F. App'x at 837–38. She took another position with a lower salary—a decrease from $57,700 to $47,000—and complained about the decrease. *Id.* at 838. She was encouraged to apply for a position at another location at a salary a little over $40,000 and responded that she was not interested. *Id.* Subsequently, her position was eliminated, she was discharged, and she was not considered for a position that would have paid her between $33,400 and $43,500. *Id.* When she complained, she was told that her superiors believed that she would not have accepted a lower position with such a stark pay decrease, especially after her earlier complaint and refusal to consider a lower salary. *Id.* The Seventh Circuit held that, even if she had made a prima facie case of discrimination, the company's reason for discharging her instead of considering her for the lower position was honest and legitimate. *Id.* at 840.

B. Comments which expressly mention the alleged target's age

Age-related comments directed to or at the alleged target can be overcome by evidence that the adverse employment decision was fully justified on other grounds. In one ADEA case, the Fourth Circuit ruled that there was no triable issue of fact because the employee's poor performance and insubordination were clear from the record. *Johnson v. Mechs. & Farmers Bank*, 309 F. App'x 675, 681–82 (4th Cir. 2009). The employee's supervisor called him "the Godfather" and told the employee he wanted to bring in "young blood," but the employee's unsatisfactory job record disproved the employee's assertion that he was fired "because of" his age. *Id.* In a constructive discharge case, the Eastern District of Virginia held that summary judgment was appropriate where an employee's only evidence of age discrimination was that his supervisor had said that the employee was "too old to want" to continue his job. *Martin v. Scott & Stringfellow, Inc.*, 643 F. Supp. 2d 770, 782–83 (E.D. Va. 2009). The record contained no evidence that age impacted the adverse employment decisions but substantial evidence that the employee was underperforming, complaining about management and his compensation plan, and criticizing his firm to its clients. *Id.*

C. Comments which are ambiguous

A number of cases stand for the proposition that some seemingly age-related comments are in fact references to performance, experience, or ability. Some age-related comments may refer to age or a different and legitimate employment factor. In one case, testimony showed that when an employee arrived at the interview room to interview for a promotion, one of the interviewers called him "old timer." *Lucas v. Spelling*, 493 F. Supp. 2d 49, 60 (D.D.C. 2007). The court held that the testimony created a genuine issue of material fact as to whether the comment had been made and as to whether the comment referred to the employee's tenure at his job or the employee's age. *Id.* In another case, an employee argued that references to "young blood" were evidence of discrimination; the court determined that "young blood" could refer to younger employees or more recently hired employees. *Threadgill v. Spellings*, 377 F. Supp. 158, 164 (D.D.C. 2005); *see also EEOC v. Clay Printing Co.*, 955 F.2d 936, 942–43 (4th Cir. 1992) (holding that "new blood" might or might not be evidence of age discrimination, depending on the circumstances). The Third Circuit affirmed summary judgment for a defendant under the McDonell Douglas Framework because an interviewer's "old and cold" comment did not refer to her age and gender but to the time which had elapsed since she left her last management position. *McGuigan v. Sec'y of the U.S. Dep't of Treasury*, 435 F. App'x 78, 81 (3d Cir. 2011).

MEMORANDUM

To: J.R. Murphy
Murphy & Grantland, P.A.

From: Matthew Hughes

Date: June 3, 2020

Re: Good faith insisting on settling claim when part is disputed

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Table of Contents

Memorandum

I. Introduction

An insurance carrier wants to know if it can refuse to settle a claim by category of damages where the carrier and insured agree on the value of actual damages but dispute the availability of punitive damages.

II. Question Presented

Under South Carolina insurance law, does an insurance carrier act in bad faith when it admits the value of actual damages, contests the availability of punitive damages, and insists on settling the entire claim for the admitted value of actual damages?

III. Brief Answer

No. If the carrier has reasonable grounds to dispute the claim's value, the carrier can in good faith insist on settling the claim at one time instead of by category of damages.

IV. Statement of Facts

A government employee negligently caused an accident, killing a bystander. After the deceased's spouse sued for wrongful death, the school's insurance carrier tendered the full liability amount available under the South Carolina Tort Claims Act (SCTCA) and additional UIM coverage. The spouse apparently agreed to settle for a specified sum, say $500,000, but then demanded more, insisting the UIM statute authorized punitive damages despite the SCTCA. The carrier refused to offer more, denying that the UIM statute exposes government entities' carriers to liability for punitive damages.

The plaintiff refused to settle the whole claim for the sum ($500,000[1]).[2] The carrier insisted on settling the entire claim for the sum. Neither party appears to contest that actual damages are approximately $500,000 but they dispute the availability of punitive damages. Even if a court agrees with the carrier, the plaintiff might claim that the carrier's refusal to settle the actual damages issue was in bad faith.

V. Analysis

Any named insured may sue for bad faith refusal to pay insurance benefits, but no private individual can sue a government entity's UIM carrier for bad faith. *Kleckley v. Northwestern Nat'l Cas. Co.*, 338 S.C. 131, 134–35, 526 S.E.2d 218, 219–20 (2000) (citations omitted)[3]; *Myers v.*

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[1] This sum was invented to protect the identity of the parties and ensure confidentiality. The sum does not reflect the SCTCA's liability limits.

[2] Rule 43(k) of the South Carolina Rules of Civil Procedure rendered the apparent agreement unenforceable. Rule 43(k) requires all settlement agreements to be in the form of a consent order or written stipulation entered in the record, or made in open court and on the record, or in writing signed by both parties and their attorneys. Because the purpose of Rule 43(k) is "to prevent disputes as to the existence and terms of agreements regarding pending litigation," it operates to bar enforcement of otherwise valid and undisputed settlement agreements. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (citation omitted) (holding settlement agreed was voidable even though the plaintiff authorized her attorney to offer a settlement, the attorney made an offer in writing, and the defendant's attorney accepted it). Rule 43(k) applies even if both parties signed the agreement, *Buckley v. Shealy*, 370, S.C. 317, 320–22 635, S.E.2d 76, 77–78 (2006), if the parties settle and counsel for both parties confirm to the court that the parties have settled, *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 493, 458 S.E.2d 533, 535 (1995), and if the agreement is admitted or has been carried out or both. *Farnsworth*, 367 S.C. at 637–38, 627 S.E.2d at 726 (rejecting a prior dictum to the contrary).

[3] The *Kleckley* court emphatically declared that "[t]his Court and the Court of Appeals have repeatedly denied actions for bad faith refusal to pay claims to third parties who are not named insureds." *Kleckley*, 338 S.C. at 135, 526 S.E.2d at 219. The court noted that there is a limited exception for family members of the policy based on the necessaries doctrine. *Id.* at 135, 526 S.E.2d at 220 (citing *Ateyeh v. Volkswagen of Florence, Inc.*, 288 S.C. 101, 341 S.E.2d 378 (1986)).

State Farm Mut. Auto. Ins., 950 F. Supp. 148, 151 (D.S.C. 1997) (noting the majority view that UIM carriers do not owe a duty of good faith to an insured based on the insured's claim against another of the carrier's insureds) (citation omitted). Although a government entity's carrier could dispute UIM benefits to a third party without fear of a bad faith action,[4] the injured party's carrier has no such luxury. It must determine when its duty of good faith arises and whether insisting on settling all damages issues for a single cause of action together breaches that duty.

A. When does the duty of good faith arise?

The general duty of good faith arises when the insured files a claim for benefits. *See BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) (noting that the insurer's duty to act in good faith includes a duty to investigate the claim). The duty to attempt a reasonable settlement arises when the insured sues the at-fault driver but may arise earlier. *Senn Freight Lines, Inc. v. Am. Inter-Fidelity Corp.*, No. 8:17-cv-02186-JDA, 2020 U.S. Dist. LEXIS 17826, at *14–17 (D.S.C. Feb. 4, 2020) (citations omitted); s*ee Fowler v. State Farm Mut. Auto. Ins.*, 759 F. App'x 160, 163–64 (4th Cir. 2019) (citing South Carolina cases); *Snyder v. State Farm Mut. Auto. Ins.*, 586 F. Supp. 2d 453, 458–60 (D.S.C. 2008). For example, it can arise when "the insured suffered damages greatly in excess of the [at-fault party's] liability limits." *Myers*, 950 F. Supp. at 151.

B. When is an offer reasonable?

When the duty to settle arises, the UIM carrier need only offer a reasonable amount. *Collins v. Auto-Owners Ins.*, 759 F. Supp. 2d 728, 740 (D.S.C. 2010); *Snyder*, 586 F. Supp. 2d at 458. "If there is reasonable ground for contesting a claim, there is no bad faith." *Crossley v. State Farm Mut. Auto. Ins.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).[5] Reasonable grounds include certain facts and statutory interpretations. The UIM carrier here has reasonable grounds for refusing to cover alleged punitive damages.

1. Facts as reasonable grounds

An offer can be reasonable because the UIM carrier, after a good faith investigation, reasonably questions whether the facts justify the insured's claim either because they cast doubt on the defendant's liability or the amount of damages. *Collins*, 759 F. Supp. 2d at 740–41; *Crossley*, 307 S.C. at 360, 415 S.E.2d at 397. It can be reasonable because it relies on a reasonable interpretation of the policy. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645,

[4] This restricted feature of bad faith claims does not necessarily prevent other claims. *See Duncan v. Provident Mut. Life Ins.*, 310 S.C. 465, 468, 427 S.E.2d 657, 659 (1993) (holding that the federal Employee Retirement Income Security Act preempts state causes of action when a violation of the Act is "asserted against an employee benefit plan").

[5] Reasonable grounds for contesting a claim must be based on the information available to the carrier at the time it contested the claim. *Howard v. State Farm Mut. Auto. Ins.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994).

594 S.E.2d 455, 462 (2004). The UIM carrier might reasonably dispute recklessness, without which punitive damages are unavailable.

2. Statutory interpretation as a reasonable ground

An offer can also be reasonable if the carrier reasonably believes that no statute requires coverage. *See State Farm Life Ins. Co v. Murphy*, No. 2:15-cv-04793-DCN, 2017 U.S. Dist. LEXIS 168588, at *14–16 (D.S.C. Oct. 12, 2017); *McMorris v. Allstate Ins.*, No. 3:16-cv-00339-CMC, 2016 U.S. Dist. LEXIS 198065, at *6 (D.S.C. July 22, 2016); *Louthian v. State Farm Mut. Ins. Co.*, 357 F. Supp. 894, 901 (D.S.C. 1973) (reasoning that the insurance company's refusal to pay must have been reasonable where state courts agreed with its interpretation of a statute and only extensive effort and research demonstrate that a contrary interpretation was the proper one); *Baker v. Pilot Life Ins.*, 268 S.C. 609, 612–13, 235 S.E.2d 300, 302 (1977).

In *Murphy*, several parties to a property ownership lawsuit claimed they were entitled to a $100,000 policy. *Murphy*, 2017 U.S. Dist. LEXIS 198065 at *15. The question hinged on the meaning of "divorce or annulment" in the family code. *Id.* The court granted summary judgment for the carrier on a bad faith claim, reasoning that the carrier's decision to interplead the funds into the lawsuit was reasonable because the proper interpretation of § 507 was in serious question. *Id.* at *14–15.

In *Louthian*, the carrier and insured disputed the meaning of "injury or damage . . . caused by physical contact with the unknown vehicle." *Louthian*, 357 F. Supp. at 896. A South Carolina state court held that the language was "clear and concise and specifically states that no action can be brought, unless caused by actual physical contact with the unknown vehicle." *Id.* The Federal District Court for the District of South Carolina, noting that the state court action was on appeal and concluding that the South Carolina Supreme Court would most likely reverse the county court's interpretation, denied the plaintiff's motion for summary judgment on bad faith because discovering the correct interpretation entailed extremely laborious research and the most careful judgment. *Id.* at 901.

The UIM carrier's position on punitive damages is eminently reasonable. As explained in a prior memorandum, there are no cases on point and the carrier's position is legally sound. The UIM statute requires carriers to offer UIM coverage payable "in the event that *damages* are sustained *in excess* of the liability *limits* carried by an at-fault insured or underinsured motorist or *in excess* of any damages *cap* or *limitation* imposed by statute." S.C. Code § 38-77-160 (emphasis added). Though "damages" can include punitive damages, S.C. Code § 38-77-30(4); *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010), the phrase *in excess* and the words *cap* and *limitation* refer to restrictions on the *amount*, not on the *kind* of damages available. This interpretation is consistent with the use of *limit* and *limitation* elsewhere in the mandate to write automobile insurance and the SCTCA. Also, the UIM statute requires insurers to offer a certain level of coverage but allows insureds to contract for less coverage.

Therefore, the UIM carrier has reasonable grounds for refusing to offer any amount for punitive damages. But is it reasonable to refuse to settle the actual damages portion until the plaintiff agrees to drop the punitive damages issue?

C. Can a carrier insist on settling a claim at one time?

Because the UIM carrier reasonably disputes the claim's value, it can insist on settling the claim at one time instead of piecemeal. The courts consistently speak of settling a "claim," not parts of a claim. *Jordan v. Allstate Ins. Co.*, No. 4:14-cv-03007-RBH, 2016 U.S. Dist. LEXIS 108091, at *15 (D.S.C. Aug. 16, 2016) (citing *Collins*, 759 F. Supp. 2d at 741–42; *Snyder*, 586 F. Supp. 2d at 458; *Crossley*, 307 S.C. at 360, 415 S.E.2d at 397), *aff'd by Jordan v. Allstate Ins. Co.*, No. 16-2049, 678 F. App'x 171 (4th Cir. 2017). They also indicate that reasonable dispute on a single aspect of a claim justifies disputing the value of the entire claim. *Collins*, 759 F. Supp. 2d at 740–41; *Crossley*, 307 S.C. at 360, 415 S.E.2d at 397. "[T]hat the parties ha[ve] different estimations of the value of a *claim* is not, under South Carolina law, evidence of bad faith on the part of the party offering the lower amount." *Collins v. Auto-Owners Ins.*, 438 F. App'x 247, 249 (4th Cir. 2011) (emphasis added). It is significant that the major cases interpreting the scope of "damages" in the UIM statute did not involve bad faith claims. *Russo v. Nationwide Mut. Ins.*, 334 S.C. 455 513 S.E.2d 127 (Ct. App. 1999) (holding that "damages" includes bodily injury and property damages) (citing *Mathis v. State Farm Auto. Ins.*, 315 S.C. 71, 431 S.E.2d 619 (Ct. App. 1993)). And a carrier need not offer to settle a claim at a certain amount merely because it once admitted the claim might be worth that much. *Id.* If justified by facts or arguments relating to statutory interpretation, a UIM carrier can insist on settling a claim in one sitting.

VI. Conclusion

A carrier can reasonably dispute the value of a claim based on facts or statutory interpretation. The facts or proper interpretation of a statute may indicate that UIM coverage has not been triggered or is due in an amount lower than the insured's demands. The carrier need only offer a reasonable amount, even if it previously admitted the claim could be worth more. And it can refuse to settle a claim piecemeal, one category of damages at a time. Therefore, a UIM carrier can refuse to offer more than what is reasonable on a claim without fear of being held liable for bad faith.

Applicant Details

First Name	**Samuel**
Middle Initial	**T**
Last Name	**Hurst-MacDonald**
Citizenship Status	**U. S. Citizen**
Email Address	**sth70@georgetown.edu**
Address	**Address** Street **1331 Maryland Ave SW, Unit 409** City **Washington DC** State/Territory **District of Columbia** Zip **20024** Country **United States**
Contact Phone Number	**9783042618**

Applicant Education

BA/BS From	**University of Massachusetts-Amherst**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Environmental Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Blank Horn, Marian
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Ho, Jeremiah
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Diamond, Michael
diamondm@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable Elizabeth W. Hanes
United States District Court

Dear Judge Hanes,

I am a third-year student at Georgetown University Law Center and member of the Georgetown Environmental Law Review. I am applying for a 2022 clerkship in your chambers.

Before attending law school, I was privileged to work at Goodwin in their case assistant apprenticeship program. One or two times a month in that capacity I would work with the Discovering Justice program which brings schoolchildren into the court, tours them around, and organizes a mock trial for them. During these vicious prosecutions of Goldilocks or civil suits for ownership of an abandoned teddy bear, we would often talk to the children about the importance of the truth, asking them what they thought was fair and just. It was after a powerful witness statement about porridge temperature that I first made a promise to myself to work at the court, and clerk, to wrestle on my own with the issues of what is fair and just.

I have enclosed my resume, transcripts, list of references and writing samples to my application, as well as letters of recommendation from Professor Michael Diamond of Georgetown Law, Judge Marion Blank Horn of the United States Court of Federal Claims, and Professor Jeremiah Ho of University of Massachusetts School of Law. Please note that the less traditional format of my letter from Judge Horn is due to ethical restrictions in her ability to write more focused letters, and she has graciously requested to be listed as an oral recommendation as well, and her contact information is listed within the attached list of references.

Sincerely,

Samuel T. Hurst-MacDonald

SAMUEL T. HURST-MACDONALD

1331 Maryland Avenue SW #409, Washington, DC 20024 • (978) 304-2618 • sth70@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor — **Expected May 2022**
GPA: 3.57
Journal: *Georgetown Environmental Law Review* – Staff Member

UNIVERSITY OF MASSACHUSETTS SCHOOL OF LAW — **Dartmouth, MA**
First-year J.D. coursework completed — **2019 – 2020**
GPA: 3.86, A+ in Contracts, A+ in Torts, A in Civil Procedure, A in Legal Writing
Journal: *UMass Law Review* (Invitation extended)
Honors: Dean's Full Merit Scholar

UNIVERSITY OF MASSACHUSETTS, AMHERST — **Amherst, MA**
Bachelor of Arts, Political Science — **May 2017**

EXPERIENCE

Securities and Exchange Commission — **Washington, DC**
Student Honors Legal Program (Begins August 17) — **August – December 2021**

Willkie Farr & Gallagher LLP — **New York, NY**
Summer Associate — **May – August 2021**

U.S. Court of Federal Claims — **Washington, DC**
Judicial Extern – Honorable Judge Marian Blank Horn — **August – December 2020**

- Assisted in drafting memoranda, orders, and opinions for review and subsequent revision by Judge Horn.
- Observed pre-trial conferences, ADR, trials, motion arguments, and bid protest cases.

Committee for Public Counsel Services – CAFL Division — **Boston, MA**
Summer Legal Intern — **June – August 2020**

- Performed legal research on caselaw for proposed DCF regulatory reforms on parental visitation rights.
- Drafted witness cross-examinations, briefs, motions, and memoranda for complex and sustained civil litigation.

Department of The Interior – Office of the Solicitor (Summer 2020 Intern: Program Cancelled-COVID) — **Boston, MA**

Goodwin Procter LLP — **Boston, MA**
Private Equity/Business Law Case Assistant — **June 2018 – August 2019**

- Assisted teams of attorneys for emerging company formation, growth equity financings, mergers, and acquisitions.
- Drafted supplemental deal documents, corporate governance documents, and aided in organization of closings.
- Recognized in newsletters for work on $460m acquisition, $300m fund creation and volunteering at Discovering Justice.

Fragomen, Delray, Bernsen, and Loewy LLP — **Boston, MA**
Immigration Paralegal — **December 2017 – May 2018**

- Top billing paralegal for permanent residency team in final three months.
- Drafted petitions, applications, support letters detailing eligibility for visa classification and other immigration benefits.

Community Involvement and Interests

- **Discovering Justice** - Mock Trial Volunteer at Moakley US Courthouse (2018-2019)
- **The Boston Sports Museum** - Young Leaders Council (2017-2019)
- Interests include skiing, sci-fi books, chess, building on ports in Settlers of Catan, and basketball.

Record of: Samuel T. Hurst-MacDonald
GUID: 801268861

Course Level: Juris Doctor

Transfer Credit:
Univ of Massachusetts Dartmout MA
School Total: 30.00
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	004	05	Constitutional Law I: The Federal System Nicholas Rosenkranz	3.00	A-	11.01	
LAWJ	121	01	Corporations Michael Diamond	4.00	A-	14.68	
LAWJ	128	08	Criminal Procedure Brent Newton	2.00	P	0.00	
LAWJ	1491	03	Externship I Seminar (J.D. Externship Program) Alexander White		NG		
LAWJ	1491	125	~Seminar Alexander White	1.00	A-	3.67	
LAWJ	1491	127	~Fieldwork 3cr Alexander White	3.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	8.00	29.36	3.67
Cumulative	43.00	8.00	29.36	3.67

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1349	08	Administrative Law Lisa Heinzerling	3.00	P	0.00	
LAWJ	193	09	Financial Regulation and Financial Crisis Timothy Massad	2.00	A	8.00	
LAWJ	202	07	Government Contracts John Horan	2.00	A-	7.34	
LAWJ	2087	09	White Collar Crime and Securities Fraud Luke Cass	2.00	B+	6.66	
LAWJ	361	17	Professional Responsibility: The Ethical Lawyer and the Good Life Stephen Marcus	2.00	B+	6.66	
LAWJ	396	05	Securities Regulation Donald Langevoort	4.00	B+	13.32	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	12.00	41.98	3.50
Annual	28.00	20.00	71.34	3.57
Cumulative	58.00	20.00	71.34	3.57

End of Juris Doctor Record

List of References for Samuel T. Hurst-MacDonald

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January 10, 2021

Samuel T. Hurst-MacDonald
1331 Maryland Avenue SW #409
Washington, DC 20024

Dear Mr. Hurst-MacDonald:

Thank you for your excellent contributions during your thirteen week internship in my chambers at the United States Court of Federal Claims during the Fall of 2020. You can be very proud of what you accomplished at the court. You adjusted remarkably well to a remote internship during these unusual COVID times and you were as productive as if we were in adjoining offices. I thoroughly enjoyed having you as part of our team.

The United States Court of Federal Claims is a court which hears cases from all geographical areas of the United States, including those in the subject matter areas of government contracts, Fifth Amendment takings, tax, intellectual property, military and civilian pay, and vaccine compensation. The cases often are complicated, multi-issue, and involve large dollar claims. The cases are assigned to the judges of the court on a random basis, so each judge has a wide variety of subject matter and geographically based cases on his or her assigned docket.

Every judge uses interns differently. I favor stretching individual capability to the maximum. Consequently, I assign major responsibility for individual cases to interns, from as early in the case as possible, up through the issuance of a final opinion. After discussion, interns are asked to write first drafts of orders and opinions, to assist in multiple revisions, and to undertake specific legal research and writing assignments. Interns also have an opportunity to observe and to assist in the courtroom during trials, oral arguments, and alternative dispute resolution mediations, including virtual proceedings. My experience is that both the students and the court benefit greatly from the internships.

You were productive, and provided substantial and valuable assistance to me on several drafts which assisted in reaching a decision on a jurisdictional motion to dismiss. Also, you drafted the findings of fact on a complicated contract/takings case and you drafted the findings of fact on a fast moving bid protest, which helped me prepare for multiple hearings in the protest.

During the Fall you demonstrated that you could work efficiently and independently, as well effectively integrate remotely into the chambers' team. You demonstrated maturity and excellent judgment during the course of the internship. In the cases on which you worked, you were able to understand and research complex issues. You also assisted in the general legal work of the office, virtually attended court sessions, including a trial, and participated in case management and pre- and post-hearing chambers strategy sessions.

You are very precise, technically able, researched with understanding and care, and wrote clearly. You demonstrated that you are efficient and capable of producing timely, quality work. You also take instruction well and you are eager to learn. Interactions with you were always pleasant. I also appreciated your willingness to continue to work and complete projects on the assigned cases after your internship had ended. That effort to go above and beyond will serve you well as a lawyer. I know that you have a bright future as an attorney and I am confident that you will be an asset to your future employers. I look forward to staying in touch with you and following your career. Please feel free to list me as a reference. It has been a pleasure getting to know you and to work together.

Very truly yours,

Marian Blank Horn
Judge

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Mr. Samuel Hurst-MacDonald as a clerk in your chambers. At the University of Massachusetts School of Law, where he was a 1L during the 2019-2020 academic year, I had the pleasure of teaching Mr. Hurst-MacDonald during both fall and spring semesters. In my Contracts I last fall, Mr. Hurst-MacDonald brought a high level of lawyerly intellect and dedicated hard work, time and time again. On the final class grade, he scored an A+ in Contracts I, which was the highest grade in the course. Although the Law School did not give letter grades in the spring because of our temporary COVID-19 policies, I took the opportunity to review his performance in my course the subsequent summer for his summer internship applications. Again, I was pleased to find that Mr. Hurst-MacDonald received the highest grade in my class for spring 2020. Had letter grades been given, Mr. Hurst-MacDonald would have received an A+ in Contracts II. I am very glad to share with you my experiences teaching Mr. Hurst-MacDonald. Below are my sincerest observations of him.

Academically, Mr. Hurst-MacDonald was an exceptional student with a very strong aptitude for the law. He is an insightful legal thinker and a quicker learner. In my classes, he demonstrated an acute ability to respond swiftly to difficult questions about the law, and he contributed frequently to a variety of discussions the courses covered—whether we were discussing policy issues, difficult case law, or an application of law to facts. He was always well-prepared and seemed to enjoy discussing legal theory and topics within the law. As far as the subject matter of the contracts courses were concerned, he showed a particular passion for commercial law, which proved to be a good motivator for conversations at my office hours. When we discussed problems and cases in commercial transactions during those meetings, I always noticed that Mr. Hurst-MacDonald illustrated a flexible engagement with this area of law that showed that he can switch between seeing “the forest for the trees” on an issue and then honing in on some technical, legal aspect on a more microscopic level. In other words, he was more than capable of thinking legally and doctrinally to problem-solve. But he always contributed deep ideas and critical insight into his reading of cases and of the law, and he was also able to tie the doctrine we were learning in my classes to bigger ideas about the law that expanded upon larger policy-oriented topics, such as good faith, truth, and fairness.

Mr. Hurst-MacDonald also demonstrated a sense for what’s practical and how the real world beyond the law classroom works. Part of the ease in this attribute, I believe, is due to his time as a military officer and his work experiences before law school. He was able to read between the lines in the cases and then postulate during class discussions how legal principles would play out in commercial dealings and litigation. Combined with his high aptitude for the law, his in-class contributions proved to me that he has the right foundational perspectives for being a very thoughtful, skillful legal thinker. As his transcript from likely indicate, Mr. Hurst-MacDonald is student who was at the top of his class at UMass Law. I would not be surprised if other law faculty members here had the same experiences with him in their classes. I also would not be surprised if he excelled after transferring to the Georgetown University Law Center.

Thank you for this opportunity to recommend Mr. Hurst-MacDonald. Please feel free to contact me with any further questions.

Sincerely,

Jeremiah Ho
Associate Professor of Law
University of Massachusetts School of Law

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to support the application of Samuel Hurst-MacDonald to be a clerk in your chambers. I have gotten to know Mr. Hurst MacDonald under trying circumstances during this all-online year of teaching at Georgetown. Mr. Hurst MacDonald was a second-year transfer to Georgetown, so I did not get to know him until this past fall when he was a student in my corporations class. Despite the digital divide, I got a good sense of Mr. Hurst-MacDonald's avid interest in learning. He was a regular and valuable contributor to class discussion. His questions, comments, and insights regularly furthered the exploration of corporate doctrine and theory. I have also met with Mr. Hurst-MacDonald in several online meetings during office hours and at other times. These interactions have helped bridge the gap between live meetings and interactions and the more anonymous electronic ones.

Mr. Hurst-MacDonald has consistently displayed an intellectual and personal curiosity that derives from an upbringing that prioritized inquiry and debate. He showed it in class, in his decision to explore the law through a paralegal experience prior to deciding whether to apply to law school, and in the range of jobs and internships he has undertaken in an effort to find what he really wants to do with his life. He has now focused on litigation in the corporate and securities area. He speaks about litigating in the "gray areas" of the law to find (and to help create) clarity. Beyond that, however, he continues to want to participate in the pro bono world in order to advance his sense of social justice.

As a candidate for your chambers Mr. Hurst-MacDonald brings intelligence, persistence, and curiosity and these admirable traits are combined in a personable young man with a sense of duty and commitment. He has received accolades from prior supervisors including from the Court of Federal Claims for whom he interned.

With all this having been said, I can wholeheartedly recommend Mr. Hurst MacDonald as a clerk in your chambers. I hope you will act favorably on his application.

Yours truly,

Michael Diamond
Professor of Law

Michael Diamond - diamondm@law.georgetown.edu

MEMORANDUM

To: Senior Partner

From: Samuel T. Hurst-MacDonald, Section 5.

Date: December 4, 2019

Re: Ms. Payne – Creation of Express Warranty

QUESTION PRESENTED

Under Tenn. Code. Ann. § 47-2-313 (2001), did Mr. Dean create an express warranty when he gave written and oral statements to Ms. Payne regarding the quality of his corn and its fitness for her business?

BRIEF ANSWER

Yes, Mr. Dean probably created an express warranty regarding the quality and fitness of corn for Ms. Payne's business. Tenn. Code. Ann. § 47-2-313 states "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty." Therefore, Mr. Dean probably created an express warranty because his affirmations related to the goods and became a basis of the bargain.

STATEMENT OF FACTS

Our client, Ms. Payne, entered into a contract with Mr. Dean for the supply of corn to her business. 15-18% of the corn which Mr. Dean supplied Ms. Payne was rotting and unusable, and Ms. Payne wants to sue for breach of contract. Ms. Payne has asked us to assess whether Mr. Dean created and breached an express warranty under Tenn. Code. Ann. § 47-2-313.

It had been Ms. Payne's life work to open a catering company with a focus on cornbread. She had saved to rent her business space and extensively researched corn suppliers for her

business throughout the fall and winter of 2018. In late March 2019 she visited Mr. Dean's farm after learning he was an established farmer who supplied several premier restaurants in the area.

On that visit Mr. Dean and Ms. Payne spoke of her business goals, her dream to make the best cornbread in the world, and her need for the best corn to make that cornbread. Mr. Dean told her that she had "come to the right place" for her corn. Mr. Dean stated, "I know everything there is to know about growing corn, and I've been doing it for my whole life. My corn is the finest corn grown in all of Tennessee." Mr. Dean also gave Ms. Payne a copy of a full-page brochure advertising his farm and his products, which lists Mr. Dean as holding a Master of Agriculture degree, called Mr. Dean a "Premier Producer of the Highest Quality Corn" and that there is "No Corn Better Than Dean's Corn." There were no specifications as to quality of corn in the contract itself, but Ms. Payne stated she believed and understood from everything that she had seen and heard from Mr. Dean that she would be receiving only corn of the "finest quality."

That same day, March 19, 2019, Ms. Payne and Mr. Dean signed a contract for five-hundred bushels of corn at $4.00 a bushel. When the first shipment arrived on May 15, 2019, the corn was found to be small, dry, rotting, and discolored, such that at least 15-18% of the product was unusable for Ms. Payne's authentic homemade cornbread.

The alleged breach of contract between Mr. Dean and Ms. Payne has caused Ms. Payne to delay opening her business, as well as emotional and economic damages. She wishes to pursue a lawsuit against Mr. Dean under Tenn. Code. Ann. § 47-2-313 for breach of express warranty.

DISCUSSION

I. Ms. Payne will be able to prove an express warranty was created through the statements and affirmations Mr. Dean made.

The Court will likely find an express warranty was formed because Mr. Dean made multiple affirmations to induce a purchase of corn, and the affirmations induced Ms. Payne's

purchase. The express warranty statute was created to protect good-faith consumers from incurring damages caused by reliance on affirmations sellers made to induce purchase. The statute states: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Tenn. Code. Ann. § 47-2-313. Plaintiffs must satisfy a test in order to make a successful express warranty claim as follows: "(1) Seller made an affirmation of fact intending to induce the buyer to purchase the goods; (2) Buyer was in fact induced by the seller's acts; and (3) The affirmation of fact was false regardless of the seller's knowledge of the falsity or intention to create a warranty." *Body Invest, LLC v. Cone Solvents, Inc.*, 2007 Tenn. App. LEXIS 480, 2007 WL 2198230, at *18 (Tenn. Ct. App. July 26, 2007); *Coffey v. Dowley Mfg. Inc.*, 187 F. Supp. 2d 958, 969 (M.D. Tenn. 2002). Here, all three elements are in dispute, however we need only address whether Mr. Dean made an affirmation of fact intending to induce the buyer, and that the buyer was induced because an expert will address the third element of falsity. In our case Mr. Dean, with the intent to induce Ms. Payne to purchase, affirmed that his corn was the "finest corn in Tennessee" and that it was the right corn for Ms. Payne. Ms. Payne was induced to buy the corn because of Mr. Dean's affirmations; therefore, his affirmations formed the basis of the bargain and created an express warranty.

A. Defendant made Affirmations with the intent to induce a purchase.

Mr. Dean made affirmations of fact because he provided Ms. Payne with flyers and oral statements asserting the fitness and quality of his corn with the intent to induce her purchase. An affirmation is an assertion of fact in any form given to the buyer by the seller with the intent to induce a purchase. *Motley v. Fluid Power of Memphis, Inc.*, 640 S.W.2d 222, 9 (Tenn. Ct. App. 1982); *Body Invest, LLC*, 2007 Tenn. App. LEXIS 480, 2007 WL 2198230, at *18. In the

Court's consideration of whether an assertion of fact has been given to induce purchase, it is imperative to consider the language and materials as exchanged within "the context of the bargain." *Smith v. Bearfield*, 950 S.W.2d 40, 41 (Tenn. Ct. App. 1997). An express warranty may be formed without the use of formal words such as "warrant" or "guarantee", or without the intention of the seller to make a warranty, but an affirmation "merely of the value of the goods" or a statement "purporting to be merely the seller's opinion or commendation of the goods" does not create a warranty. Tenn. Code. Ann. § 47-2-313.

For an assertion to become an affirmation of fact, it must be given by the seller with intent to induce a purchase. For example, a seller sent a letter stating their control system met buyers' requirements. *Motley*, 640 S.W.2d 222, at 225. The Court held that letter to be an affirmation forming the basis of the bargain. *Id*. at 226. The Court reasoned that the letter was an instrument given by the seller to assert the compatibility of its product with the buyers' request. *Id*. The Court further reasoned that the intent for asserting compatibility with the buyer was to induce purchase, and thus the assertion that the system met requirements in the letter was an affirmation of fact forming the basis of the bargain. *Id*.

The Court must consider an assertion within the context of the bargain to determine if it is an affirmation of fact. For example, a seller made comments about a tractor, stating that it "worked good" and would do what the buyer needed. *Smith*, 950 S.W.2d, at 41. The Court held the assertion that a tractor worked and was fit for the buyers' purpose was an affirmation of fact. *Id*. The Court reasoned that in a vacuum, statements like this may not appear to be affirmations, but that the context of the bargain controls whether assertions are affirmations, and reasoned that within the context of their bargaining, the purpose of asserting the tractor would do what the buyer needed was to induce the purchase, thus it was an affirmation. *Id*.

The Court will likely rule Mr. Dean gave Ms. Payne the flyer to induce her purchase because he asserted that his product fit her requirements, and thus it is an affirmation of fact for the quality of his corn. As in *Motley* where the Court held that because the letter was given to the buyer in order to assert their ability to fill the buyer's requirements, it was given to induce purchase and thus an affirmation, here too Mr. Dean provided a flyer in order to assert his ability to fulfill Ms. Payne's requirements in order to induce her purchase. Mr. Dean asserted in the flyer that his corn was premier, that the finest restaurants in Tennessee use his corn, that there was no corn better than his corn, and as such it would fulfill Ms. Payne's requirements. Thus, the Court will likely find the statements in the flyer to be affirmations given by Mr. Dean to induce purchase from Ms. Payne, forming the basis of the bargain in regard to the quality of the corn.

In the context of the bargaining, the Court will likely find the combination of statements and written materials asserting the quality and fitness of corn to have been affirmations of fact. Like *Smith* where in the context of the bargaining, the Court found the representations of the seller had been affirmations of fact, here too in the context of the bargaining Mr. Dean's representations will likely be considered affirmations of fact. In *Smith* the Court recognized that in a vacuum, stating a tractor "worked good" would not be an affirmation. However, the seller knew what the buyer wanted and made those general statements to induce the buyer to purchase, and therefore those statements became affirmations of fact. Although in a vacuum stating that someone came to the right place and that something is the finest quality would not be considered affirmations, here within the context of their bargaining, Mr. Dean knew what Ms. Payne needed and made those assertions to induce her purchase. In the context of knowing what the buyer requires and asserting you can satisfy that requirement; the Court will infer that the statements

were made to induce a purchase. Thus, the Court will likely find that because the assertions by Mr. Dean were given in order to induce a purchase, they are affirmations of fact.

The Court will likely find Mr. Dean's multiple oral statements and written assertions to be affirmations of fact for the fitness and quality of his corn. Mr. Dean asserted that his corn was of the finest quality in Tennessee and that it was the right corn for Ms. Payne's purpose. Considering these assertions in the context of the bargaining, the Court will find they were made to induce Ms. Payne's purchase, thus, Mr. Dean's assertions will be ruled to be affirmations.

B. Seller's affirmations induced the buyer's purchase.

The Court will likely find that Ms. Payne was induced to purchase because she reasonably relied upon the veracity of Mr. Dean's affirmations in her decision to purchase. In order for inducement by the seller to be found, the buyer must rely upon the affirmations made by the seller in their decision to purchase. *Fletcher v. Coffee Cty. Farmers Coop*., 618 S.W.2d 490, 493 (Tenn. Ct. App. 1981). The Court must consider the existence of reliance within the context of the bargaining process. *Id.* at 494. If a company affirms their product is the correct product for a buyer's needs, and then the buyer purchases the product, it is a strong indicator of reasonable reliance by the buyer. *Bd. of Dirs. of Harriman Sch. Dist. v. Sw. Petroleum Corp.*, 757 S.W.2d 669, 673 (Tenn. Ct. App. 1998). In regard to "puffery" the context of the bargaining and whether the buyer reasonably relied on the affirmation from the seller determines whether the assertion is an affirmation or puffery, not whether the claims objectively seem to be puffery. *SFEG Corp. v. Blendtec, Inc.*, No. 3:15-cv-0466, 2017 U.S. Dist. LEXIS 12413, at *47 (M.D. Tenn. Jan. 30, 2017). Here, the Court will likely find Ms. Payne was induced to purchase because Mr. Dean affirmed that his corn fit the requirements, she relied upon his affirmation in her decision to buy, and within the context of their bargaining she had no reason to distrust him.

Reliance upon a seller's affirmation in the buyer's decision to purchase is a key factor in the Courts consideration of whether the buyer's purchase was induced. For example, a store worker affirmed a pesticide would shield a farmer's crop, and the farmer relied upon that affirmation in making his purchase of the pesticide. *Fletcher*, 618 S.W.2d 490, at 493. The Court held that an express warranty was formed because of the farmers reliance. *Id*. They reasoned the seller had asserted themselves to be knowledgeable in that field, and because the farmer reasonably believed and relied upon the affirmation, that affirmation formed the basis of the bargain. *Id*. The Court further reasoned that reliance must be considered within the context of the bargain, not objectively, as the defendant wished. *Id*.

Seller's affirmation that a product is the correct product for a company's needs is a strong indicator of buyers' reliance. This was emphasized where an agent of a company represented that their sealant was the proper product to fill the buyer's requirements for sealing a roof. *Bd. of Dirs. of Harriman Sch. Dist.*, 757 S.W.2d 669, at 673. The Court held the buyer's purchase was induced because the seller affirmed their sealant was the correct product, and the buyer relied on that in their purchasing decision. *Id.* The Court reasoned that when considering if there is reliance, if the seller has affirmed that their product fits the buyers requirements, it is likely there is reasonable reliance because had the company informed the buyer that their product was not the correct product, the buyer "would undoubtedly not have entered into the contract." *Id.*

If a seller has superior knowledge in the context of bargain, and the buyer relies upon affirmations made by a seller, those affirmations form the basis of the bargain regardless of whether they objectively may appear to be mere puffery. For example, a company with superior knowledge affirmed that its product was better than that of a competitor, and the buyer relied upon that affirmation in its decision to purchase. *SFEG Corp.*, 2017 U.S. Dist. LEXIS 12413, at